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# Modern Maritime Neutrality Law

*James Farrant*

## *Abstract*

This dissertation is a fundamental reappraisal of the rules of maritime neutrality, including blockade, contraband and maritime zones. It is one of the most comprehensive reassessments of this area of the law since R. W. Tucker's seminal work published in *International Law Studies* in 1955. The piece traces the history and development of maritime neutrality rules, which are notoriously unclear, and states them as they apply today, taking into account technological advances and force structures where relevant. Where the law is uncertain, or in the view of the author unsatisfactory, this dissertation offers recommendations for the law's future development. The piece also examines how maritime neutrality rules have been affected by the development of the *jus ad bellum* since the adoption of the UN Charter in 1945, and offers an assessment of how States reconcile their duties under the Charter's use of force provisions and their traditional rights and duties under maritime neutrality law. It is hoped that this holistic approach will inform the drafting of future editions of State law of armed conflict manuals. A version of this dissertation was published in its entirety in *International Law Studies* (90 INT'L L. STUD. 198 (2014)).

# Modern Maritime Neutrality Law

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A dissertation submitted for a Masters of Jurisprudence,  
Durham University Law School

Submission – 2014

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# Modern Maritime Neutrality Law

*James Farrant\**

## INTRODUCTION

Like Mark Twain, rumours of the law of neutrality's demise are an exaggeration.<sup>1</sup> The rumours surfaced forcefully after the U.N. Charter was adopted in 1945. There are still those who occasionally perpetrate them.<sup>2</sup> Yet national law of armed conflict manuals and several recent non-State manuals rely heavily on traditional maritime neutrality law. Principles of neutrality law are also asserted in relatively new areas of legal regulation, such as air and missile operations and cyber warfare.<sup>3</sup> Neutrality's traditional "mustiness" has been superseded by a new vibrancy, which makes a detailed understanding of the rules and the principles they defend ever more important.<sup>4</sup>

Commentators have long observed that the law of maritime neutrality has rarely been settled: not only were the rules alleged to be musty, but also murky.<sup>5</sup> The most recent significant treaties governing neutrality law, Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V)<sup>6</sup> and Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War

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\* Lieutenant Commander James Farrant is a barrister serving in the Royal Navy. The views expressed in this dissertation are those of the author and do not necessarily represent the views of the UK Ministry of Defence or the UK government.

1. Frank M. White, *Mark Twain Amused*, NEW YORK JOURNAL (June 2, 1897) (quoting Mark Twain "The report of my death was an exaggeration" following the publication of newspaper reports that he had died).

2. See, e.g., Kevin J. Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda and It's a Good Thing, Too: A Response to Chang*, 47 TEXAS INTERNATIONAL LAW JOURNAL 115, 136 (2011).

3. See PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009) [hereinafter AMW MANUAL]; TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013).

4. Detlev F. Vagts, *The Traditional Concept of Neutrality in a Changing Environment*, 14 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 83, 84 (1998) ("neutrality has a slightly musty quality").

5. See 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 383–99 (Ronald Roxburgh ed., 3d ed. 1921) [hereinafter OPPENHEIM VOL. II].

6. Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague V].

(Hague XIII)<sup>7</sup> were agreed in 1907. The latter Convention, in particular, was a far from comprehensive statement of the law. It included no provisions on the law of blockade, contraband, prize law or belligerent visit and search rights. This was a consequence of irremediable disagreement between States at the Second Hague Peace Conference.<sup>8</sup> A more detailed attempt at codification of the law of naval warfare and maritime neutrality was made at the London Conference of 1909. The resulting Declaration of London was intended to be a code for application in an international prize court. Looming war in Europe and hostility to the Declaration in, ironically, London meant that it would never be ratified and the international prize court never became a reality.<sup>9</sup> Throughout this dissertation, the law up to the 1909 Declaration of London will be referred to as the traditional law.

Before examining the substantive rules of maritime neutrality, this Introduction must set some parameters. It therefore briefly defines the three broad principles of neutrality law, which inform the substantive rules of maritime neutrality. Next, it assesses *when* and *to whom* the law of neutrality applies. The Introduction then describes some of the sources relied upon throughout this dissertation.

Given how much has changed in the 105 years since the Declaration of London was drafted, it is perhaps surprising that the three broad principles which underpinned its provisions governing the conduct of neutrals are still reflected in modern military manuals. First, as between belligerent and neutral States, *prima facie*, the law of peace is applicable.<sup>10</sup> Second and third, the interrelated principles of impartiality and abstention guide the neutral's conduct towards the belligerents. The duty of impartiality is one more of form than substance. In the context of trade, for example: “‘Cash and carry’ policies are legitimate even if one of the warring powers cannot get together the cash or is prevented by geography from doing any carrying.”<sup>11</sup> The duty of abstention requires neutral States not to involve themselves in the hostilities. When resort to war was a question of policy

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7. Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415 [hereinafter Hague XIII].

8. See, e.g., the remarks of Mr. Martens on September 24, 1907 in respect of contraband. 3 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 1111 (James B. Scott ed., 1921) [hereinafter HAGUE PROCEEDINGS VOL. III].

9. STEPHEN C. NEFF, THE RIGHTS AND DUTIES OF NEUTRALS—A GENERAL HISTORY 141–42 (2000).

10. Committee on Maritime Neutrality, International Law Association, *Helsinki Principles on the Law of Maritime Neutrality*, in 68 INTERNATIONAL LAW ASSOCIATION REPORT OF THE 68TH CONFERENCE, TAIPEI, 1998, at 496, princ. 1.3 (1998) [hereinafter Helsinki Principles].

11. Vagts, *supra* note 4, at 93.



unfettered by legal restraint, this duty made little sense because the neutral State always had the right to “throw up neutrality” and join the war.<sup>12</sup> However, it is unquestionably a relevant duty since the establishment of the prohibition on the use of force.<sup>13</sup> This prohibition, widely recognized as *jus cogens*, forbids a neutral State from abandoning neutrality and joining the conflict. Accordingly, the duty of abstention is arguably stronger now than it was in 1909.

While the U.N. Charter reinforces the neutral duty of abstention, other rights and duties of neutral States may be displaced if the Security Council takes action under Chapter VII. Article 25 requires Member States to accept and carry out Security Council decisions. Article 103 provides that where there is a conflict between a State’s Charter obligations and its obligations under any other international agreement its Charter obligations prevail.<sup>14</sup> During the First Gulf War in 1991, Switzerland felt compelled to take part in economic sanctions against Iraq, even though not yet a member of the U.N. and officially neutral.<sup>15</sup> Should the Security Council make a determination under Article 39 that an act of aggression by one State against another has taken place, it is likely that the combined effect of Articles 25 and 103 is to exclude rights and duties under the law of neutrality altogether.<sup>16</sup> As the Security Council has yet to make such a determination, this remains a purely theoretical position. It goes too far to say, as one recent commentator has, that “the adoption of the UN Charter has rendered the law of neutrality’s rules governing the use of force essentially obsolete.”<sup>17</sup>

Having observed the broad principles, the next issue is *when* the law applies. Some have argued that the law of neutrality operates only in time of war and that during international hostilities which fall short of war, neutrality law does not apply.<sup>18</sup> However, the better view is that the threshold for applicability of neutrality law is the same as that for the existence of an armed conflict. This reflects the views of States in the national manuals consulted throughout this dissertation, which are listed presently.

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12. OPPENHEIM VOL. II, *supra* note 5, at 421.

13. U.N. Charter art. 2(4).

14. *Id.*, art. 103.

15. Dietrich Schindler, *Neutrality and Morality: Developments in Switzerland and in the International Community*, 14 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 155, 162 (1998).

16. *Id.* at 165.

17. Heller, *supra* note 2, at 136.

18. Michael Bothe argues that neutrality only applies in armed conflicts of “significant scope.” Michael Bothe, *The Law of Neutrality*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 549, ¶ 1106 (Dieter Fleck ed., 2008).

The last introductory question is *to whom* the law applies. The rules of maritime neutrality primarily address measures and controls which belligerents may enforce against merchant vessels of neutral character. These must be distinguished from vessels of friendly character, that is, vessels of the same nationality as the enforcing belligerent. The relationship between belligerent warships and vessels of the same nationality is a matter for the domestic law of that State. Vessels of neutral character must also be distinguished from vessels of enemy character. The law of naval warfare allows a belligerent to capture enemy merchant vessels as of right.<sup>19</sup> Neutral merchant vessels, however, may only be subject to belligerent interference where the law of neutrality provides a specific justification. Historically, there were two approaches to distinguishing between enemy and neutral vessels. The Anglo-American focused on the domicile of the owner, whereas continental European States preferred to use the owner's nationality as the defining criterion.<sup>20</sup> The dichotomy has never been resolved as a matter of international law and as late as 1950 domestic prize courts grappled with which was correct.<sup>21</sup>

In the Parts assessing the substantive rules of maritime neutrality, this dissertation will routinely refer to four national law of armed conflict manuals, which have been chosen to provide as broad a perspective as possible: Joint Service Manual of the Law of Armed Conflict (2004) (UK Manual)<sup>22</sup>; the United States' The Commander's Handbook on the Law of Naval Operations (2007) (NWP 1-14M)<sup>23</sup>; the German Rechtsgrundlagen für den Einsatz von Seestreitkräften (Commander's Handbook – Legal Bases for the Operations of

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19. See *infra* Part Five.

20. Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law*, 29 CANADIAN YEARBOOK OF INTERNATIONAL LAW 283, 291 (1991) [hereinafter Heintschel von Heinegg, *Visit, Search, Diversion, and Capture: Part I*].

21. *The Hoegh de Vries*, a decision of the Egyptian Prize Court sitting at Alexandria, summarized the two approaches before adopting the Anglo-American approach on the grounds that even where an owner is neutral by nationality, if he resides in an enemy territory "the goods are a source of wealth to the enemy State." The Court also concluded that the Anglo-American approach was the "one most generally accepted." *The Hoegh de Vries*, 17 INTERNATIONAL LAW REPORTS 447 ((Prize Ct. of Alexandria 1950) (Egypt)).

22. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004) [hereinafter UK MANUAL].

23. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (2007) [hereinafter NWP 1-14M].

Naval Forces) (2002) (German Commander's Handbook)<sup>24</sup>; and the People's Liberation Army (Navy) Operational Law Handbook (2006) (Chinese Manual).<sup>25</sup>

Three other sources will regularly be cited and warrant explanation. The San Remo Manual on International Law Applicable to Armed Conflicts at Sea<sup>26</sup> published in 1995 is a restatement of the law drafted by an international group of experts convened by the International Institute of Humanitarian Law.<sup>27</sup> The Helsinki Principles on the Law of Maritime Neutrality<sup>28</sup> were published in 1998 by a group of experts convened by the International Law Association.<sup>29</sup> Third, a group of experts at Harvard University convened to assess the impact of belligerent conduct in the First World War on the law of maritime and air neutrality. They wrote the Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War (Harvard Draft Convention) and lengthy commentary purporting to update the 1909 Declaration of London after its abandonment during the First World War.<sup>30</sup> Published in 1939, it has been described as “the most comprehensive summation of the law of neutrality in the interwar period,” which “remains unsurpassed to the present day.”<sup>31</sup>

The dissertation will proceed in six Parts. The first will assess the rights and duties of belligerent vessels in neutral territorial seas, and the rights and duties of neutral coastal States. Part Two analyses what use belligerent vessels may make of neutral port facilities—in particular, for resupply and repair. Part Three addresses the controls that belligerents may place upon trade with their enemy, and how far these controls may be enforced against neutral merchant vessels. Part Four examines a belligerent's ability to deny neutral merchant vessels use of areas of the sea by three devices of the law of naval warfare:

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24. GERMAN NAVY, BUNDESSPRACHENAMT – REFERAT SM 3 AUFTRAGSNUMMER 2002U-01441, KOMMANDANTEN HANDBUCH – RECHTSGRUNDLAGEN FÜR DEN EINSATZ VON SEESTREITKRÄFTEN (2002) [hereinafter GERMAN COMMANDER'S HANDBOOK].

25. PEOPLE'S LIBERATION ARMY (NAVY), OPERATIONAL LAW HANDBOOK (2006) [hereinafter CHINESE MANUAL]. The Chinese Manual provides an important perspective, but treats some topics in less detail than the other manuals. Where footnotes in this dissertation contain references to all manuals except the Chinese, it is because the Chinese Manual does not specifically address the issue under discussion.

26. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995).

27. *Id.* at 46–55.

28. Helsinki Principles, *supra* note 10.

29. *Id.* at 496.

30. Philip C. Jessup (Reporter), *Rights and Duties of Neutral States in Naval and Aerial War*, 33 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 167 (1939) [hereinafter Harvard Draft Convention with Commentary].

31. NEFF, *supra* note 9, at 174–77.

blockade, maritime zones and the right to exclude shipping from the vicinity of naval operations. Part Five considers “unneutral service,” a catch-all collection of other ways in which a neutral vessel might promote the cause of one belligerent over another. Finally, Part Six takes a holistic look at the means by which belligerents enforce the rules of maritime neutrality.

## PART ONE: PASSAGE RIGHTS IN TERRITORIAL SEAS

Article 3 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides: “Every State has the right to . . . territorial sea up to a limit not exceeding twelve nautical miles.”<sup>32</sup> The sovereignty of a coastal State extends to the territorial sea, the airspaces above and the seabed and subsoil below.<sup>33</sup> Coastal State sovereignty is exercised subject to UNCLOS and other rules of international law.<sup>34</sup> One important limitation on the coastal State’s sovereignty in its territorial sea is that vessels of all States enjoy certain passage rights. Depending on the particular passage right, the coastal State may have very little—or no—authority under international law to impede or restrict it. After briefly examining the general rules governing passage rights, this Part addresses to what extent belligerent States’ vessels enjoy passage rights in neutral territorial seas, and to what extent neutral States’ vessels enjoy them in belligerent territorial seas.

Four separate passage rights are exercisable in a coastal State’s territorial seas: innocent passage, transit passage, straits innocent passage<sup>35</sup> and archipelagic sea lanes passage. These are set out as a matter of treaty law in UNCLOS. UNCLOS has 166 State parties which include—with one notable exception, the U.S.—the vast majority of coastal States.<sup>36</sup> The U.S. considers all of the navigational provisions reflective of customary international law.<sup>37</sup> Despite UNCLOS’ broad ratification, this position remains controversial. The more widely accepted view is that only innocent passage and straits innocent passage are strictly applicable between non-parties to the Convention.<sup>38</sup>

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32. United Nations Law of the Sea Convention art. 3, Dec. 10, 1982, 1144 U.N.T.S. 397 [hereinafter UNCLOS].

33. *Id.*, art. 2.

34. *Id.*, art. 2(3).

35. There are several varieties of straits innocent passage, but they may be dealt with together. *See* NWP 1-14M, *supra* note 23, ¶ 2.5.3.

36. *Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks*, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, [http://www.un.org/Depts/los/reference\\_files/status2010.pdf](http://www.un.org/Depts/los/reference_files/status2010.pdf) (last visited Jan. 6, 2014) [hereinafter *Status of UNCLOS*]. The United States is the most prominent non-party.

37. NWP 1-14M, *supra* note 23, ¶ 1.2.

38. *See* James Kraska, *Legal Vortex in the Strait of Hormuz*, VIRGINIA JOURNAL OF INTERNATIONAL LAW (forthcoming 2014); Nilufer Oral, *Transit Passage Rights in the Strait of Hormuz and Iran’s Threats to Block the Passage of Oil Tankers*, AMERICAN SOCIETY OF INTERNATIONAL LAW INSIGHTS (May 3, 2012), <http://www.asil.org/insights/volume/16/issue/16/transit-passage-rights-strait-hormuz-and-iran%E2%80%99s-threats-block-passage>. Iran, a non-party to UNCLOS, considers that vessels from States

Innocent passage applies in every part of the territorial sea.<sup>39</sup> It must be exercised continuously and expeditiously for the purpose of traversing the territorial sea or visiting a harbour or port facility of the coastal State. Innocent passage may not be prejudicial to the peace, good order or security of the coastal State.<sup>40</sup> This means, for example, that vessels may not launch or recover aircraft or military devices, or compromise the coastal State's customs, fiscal, immigration or sanitary laws.<sup>41</sup> Aircraft in flight do not enjoy the right of innocent passage. The coastal State may suspend innocent passage temporarily in specified parts of the territorial sea on a non-discriminatory basis, but only for reasons essential to its national security.<sup>42</sup>

There is dispute as to whether warships enjoy the right of innocent passage. It seems clear as a matter of treaty construction that they do. First, UNCLOS, Section 3, Subsection A (which contains the rules on innocent passage) is entitled "Rules Applicable to all Ships," which does not appear to countenance any exceptions. Second, Article 19(2) specifically lists certain acts which, if carried out in the territorial sea, render passage not innocent. These include the threat or use of force against the coastal State, the launching or recovery of aircraft and the launching or recovery of any military device.<sup>43</sup> There would be little need specifically to prohibit these acts if warships did not enjoy innocent passage in the first place. Nonetheless, some States continue to assert that warships do not enjoy the right of innocent passage and demand prior notification or permission before foreign warships enter their territorial sea.<sup>44</sup>

During an armed conflict, belligerent warships and auxiliaries do not enjoy innocent passage in neutral territorial seas. Article 19(1) of UNCLOS expressly subjects the right of innocent passage to "other rules of international law," including the law of maritime

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that are parties to UNCLOS may exercise the right of transit passage in the Strait of Hormuz, but only because it has granted them permission. The International Court of Justice decision in the *Corfu Channel* case is also authority for the position that straits innocent passage is a customary law right. *Corfu Channel* (UK v. Alb.), 1949 I.C.J. 4 (Apr. 9). See also ROBIN R. CHURCHILL & A. VAUGHAN LOWE, *THE LAW OF THE SEA* 110–13 (3d ed. 1999); YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 107 (2012).

39. UNCLOS, *supra* note 32, arts. 17–19.

40. *Id.*, arts. 18, 19(1).

41. *Id.*, art. 19(2)(e)–(g).

42. *Id.*, art. 25(3).

43. *Id.*, art. 19(2)(a), (e)–(f).

44. NWP 1-14M, *supra* note 23, ¶ 2.5.2.4, asserts that warships "enjoy the right of innocent passage on an unimpeded and unannounced basis." On the other hand, the CHINESE MANUAL, *supra* note 25, at 78, 87–88, acknowledges the debate, but states that "Foreign military vessels may not enter Chinese territorial waters without the permission of the Chinese Government."

neutrality. Under traditional maritime neutrality law, belligerents enjoy only the right of “mere” passage in neutral territorial seas.<sup>45</sup> This is the position of the San Remo Manual, the Helsinki Principles and all of the modern military manuals surveyed.<sup>46</sup> The scope and nature of mere passage, and how, if it all, it differs from innocent passage, is examined below.

Transit passage is a right of maritime passage and aerial overflight.<sup>47</sup> Like innocent passage, it must be exercised continuously and expeditiously. The right applies only in straits which are (1) used for international navigation and (2) linking two parts of the high seas or an exclusive economic zone.<sup>48</sup> The second criterion is simply a matter of geography, but the first is less clear in its effect. It may amount to a threshold requirement that a particular strait is used regularly by vessels for international navigation before the right may be granted, although this approach under pre-existing customary law was rejected by the International Court of Justice (ICJ) in the *Corfu Channel* case.<sup>49</sup> Where the right of transit passage applies, it is a much broader right than innocent passage. Vessels may exercise it in their normal mode of continuous and expeditious transit.<sup>50</sup> Many States maintain that “normal” means, for example, that warships may launch and recover aircraft during transit passage.<sup>51</sup> Transit passage may not be suspended or impeded by the coastal State.<sup>52</sup>

In straits which do not meet the two-limbed definition for transit passage, UNCLOS provides that there is a right of innocent passage which may not be suspended.<sup>53</sup> This is “straits innocent passage.” Some straits are specifically excluded from the transit passage regime and thus subject to straits innocent passage. One example is straits formed by an

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45. Hague XIII, *supra* note 7, art. 10.

46. SAN REMO MANUAL, *supra* note 26, r. 19, ¶ 19.3; Helsinki Principles, *supra* note 10, princ. 2.3, cmt. at 503; UK MANUAL *supra* note 22, ¶ 13.9B; NWP 1-14M, *supra* note 23, ¶ 7.3.5. The GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 245, supports this view, although later on it states that “mere” passage is to be exercised in accordance with the UNCLOS rules on “innocent” passage. *Id.*, ¶ 246. The CHINESE MANUAL *supra* note 25, at 262–63, is not explicit on the point, but its adoption of a traditional position in respect of belligerent use of neutral ports suggests a traditional view of passage rights. Many pre-UNCLOS sources use the words “mere” and “innocent” interchangeably when referring to the passage right. *See, e.g.*, ROBERT W. TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA, 235 (1955) (Vol. 50, U.S. Naval War College International Law Studies); C.H.M. Waldock, *The Release of the Altmark’s Prisoners*, 24 BRITISH YEARBOOK OF INTERNATIONAL LAW 216, 232 (1947).

47. UNCLOS, *supra* note 32, arts. 37–44.

48. *Id.*, arts. 38(2), 37. An example is the Strait of Gibraltar.

49. *Corfu Channel*, *supra* note 38, at 28–29.

50. UNCLOS, *supra* note 32, art. 38(2).

51. *See, e.g.*, NWP 1-14M, *supra* note 23, ¶ 2.5.3.1.

52. UNCLOS, *supra* note 32, arts. 38(1), 44.

53. *Id.*, art. 45(2).

island of a State bordering the strait and its mainland where there is a route of similar convenience seaward of the island.<sup>54</sup> Another is straits which link the high seas or EEZ and the territorial sea of a third State.<sup>55</sup>

Archipelagic States (States composed entirely of islands) enjoy sovereignty over the waters within the archipelago, which are known as archipelagic waters.<sup>56</sup> However, they may provide designated sea lanes through the archipelago for foreign vessels. Where such lanes are designated, vessels enjoy the right of archipelagic sea lanes passage.<sup>57</sup> Where it applies, archipelagic sea lanes passage is, for present purposes, identical in its terms to the right of transit passage. Most importantly, it may not be suspended.<sup>58</sup>

For the purposes of this dissertation, transit passage, straits innocent passage and archipelagic sea lanes passage will be collectively referred to as the non-suspendable passage rights. Whether and to what extent they remain applicable during an armed conflict is assessed below.

#### *A. Belligerent Vessels' Passage Rights in Neutral Territorial Seas*

##### *1. Mere Passage*

Hague XIII, Article 10, provides, “The neutrality of a power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents.” Article 10 permits, rather than obliges, neutral States to allow belligerents mere passage. It is subject to qualification in Article 9, which provides: “A neutral power must apply impartially to the two belligerents the conditions, restrictions or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships and their prizes.”

Naturally enough, Hague XIII focused on the passage rights of belligerent warships.<sup>59</sup>

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54. *Id.*, arts. 38(1), 45(1)(a). An example is the Corfu Channel.

55. *Id.*, art. 45(1)(b). An example is the Gulf of Aqaba.

56. *Id.*, art. 49(1).

57. *Id.*, art. 53(1)–(2). Where lanes are not designated, the right of archipelagic sea lanes passage may be exercised through routes normally used for international navigation. *Id.*, art. 53(12).

58. *See, e.g., id.*, arts. 53(3), 54.

59. No rule of law purports to limit—or allow neutral States to limit—the passage rights of belligerent-flagged merchant vessels. None of the contemporary military manuals surveyed asserts such a rule. The author is aware of no examples of neutral States purporting to control or limit the passage of belligerent



A warship, according to UNCLOS, is a ship belonging to the armed forces of a State bearing the external markings distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list . . . and manned by a crew which is under regular armed forces discipline.<sup>60</sup>

The San Remo Manual and the Helsinki Principles expand the application of the Hague XIII passage rules to auxiliaries. An auxiliary is defined in the San Remo Manual as “a vessel, other than a warship, that is owned by or under the exclusive control of the armed forces of a State and used for the time being on government non-commercial service.”<sup>61</sup> The UK Manual uses identical terms.<sup>62</sup> The U.S. manual’s use of the term “belligerent forces” includes auxiliaries.<sup>63</sup> The German and Chinese manuals adopt the same view.<sup>64</sup> The position that the Hague XIII passage rules apply to auxiliaries is not, in fact, a new one and was considered uncontroversial as far back as 1947.<sup>65</sup> The extension of the Hague XIII regime to include auxiliaries reflects States’ views and is, it may be concluded, customary law.

Hague XIII permits a neutral State to restrict the entry of belligerent warships and auxiliaries into its territorial sea, if it does so even-handedly. For example, at the outbreak of the Second World War, Norway’s neutrality regulations provided for a defended area around Bergen which belligerent warships were forbidden to enter.<sup>66</sup> The lack of protest at this enactment might suggest it was considered lawful for a neutral State entirely to prohibit

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merchant vessels. Accordingly, belligerent-flagged merchant vessels continue to enjoy territorial sea passage rights in accordance with UNCLOS or equivalent customary law.

60. UNCLOS, *supra* note 32, art. 29. On the face of it, the definition excludes unmanned underwater or surface vehicles as they may not satisfy the “command” or “crew” requirements. Both NWP 1-14M and the German Commander’s Handbook consider that unmanned vessels enjoy sovereign immunity; this seems uncontroversial. Only NWP 1-14M explicitly states that unmanned vessels enjoy navigational passage rights to the same extent as manned vessels. This is more controversial, is not reflected in the other manuals surveyed and remains unsettled as a matter of international law. *See* NWP 1-14M, *supra* note 23, ¶¶ 2.3.4–2.3.6, 2.5.2.5; *cf.* GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 83.

61. SAN REMO MANUAL, *supra* note 26, r. 13(h).

62. UK MANUAL, *supra* note 22, ¶ 13.5.d.

63. *See, e.g.*, NWP 1-14M, *supra* note 23, ¶ 7.3.6.

64. GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 245; CHINESE MANUAL, *supra* note 25, at 262.

65. Waldock, *supra* note 46, at 216, 218.

66. *Id.* at 219. The relevant Norwegian Royal Decree is available at 32 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 154 (1938).

belligerent passage in its territorial sea.<sup>67</sup> However, the UK had objected in strong terms to an earlier suggestion by Scandinavian countries that they might do this.<sup>68</sup> Similarly, in the First World War, Germany had objected to a Dutch regulation which entirely forbade belligerent entry into its territorial sea unless in circumstances of distress.<sup>69</sup> However, the modern German Commander's Handbook, the UK Manual and the San Remo Manual all assert that a neutral power can forbid passage to belligerent warships altogether.<sup>70</sup> The balance of views appears to be that the law permits neutral States completely to prohibit passage, especially as States (such as the UK and Germany) which had once objected to this position now explicitly accept it.

Where granted, the right of mere passage is for navigational purposes only and cannot permit extravagantly circuitous voyages intended to allow a vessel to evade capture by enemy belligerent forces.<sup>71</sup> Contrarily, it is also true that “passage through neutral territorial waters, although undertaken to avoid an enemy, does not diminish the privilege of using the territorial waters for transit.”<sup>72</sup> Reconciling these positions requires analysis of two other important limitations on belligerent use of neutral territorial sea—the rules forbidding belligerents from basing operations or seeking sanctuary in neutral territorial sea. Hague XIII, Article 5, provides: “Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.” The prohibition is broader than the text might imply. Basing operations includes storing prizes or possibly even holding enemy prisoners as the *Altmark* incident, examined presently, demonstrates. The prohibition against seeking sanctuary in neutral territorial seas is a customary law rule not reflected in Hague XIII. It

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67. See, e.g., TUCKER, *supra* note 46, at 232–33 n.80; Harvard Draft Convention with Commentary, *supra* note 30, cmt. at 422–24. Such a provision was specifically excluded from Hague XIII, however. HAGUE PROCEEDINGS VOL. III, *supra* note 8, at 629.

68. Waldock, *supra* note 46, at 230. This represented a policy shift. The UK had been a leading proponent that Hague XIII should *expressly* allow neutral States to exclude belligerent warships from their territorial sea. HAGUE PROCEEDINGS VOL. III, *supra* note 8, at 705–15.

69. TUCKER, *supra* note 46, at 232–33 n.80.

70. GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 245; UK MANUAL, *supra* note 22, ¶ 13.9B; SAN REMO MANUAL, *supra* note 26, r. 19.

71. Waldock, *supra* note 46, at 232.

72. TUCKER, *supra* note 46, at 235. See also Edwin Borchard, *Was Norway Delinquent in the Case of the Altmark?*, 34 AMERICAN JOURNAL OF INTERNATIONAL LAW 289, 294 (1940).

prohibits belligerent warships from sheltering in neutral territorial seas to prevent attack or capture by the enemy.<sup>73</sup>

The 1940 *Altmark* incident partially illustrates these rules. *Altmark* was a German auxiliary en route back to Germany from the South Atlantic carrying three hundred captured British merchant seamen. As the English Channel was barred by mines, she was obliged to transit to the north of the UK. On February 14, 1940, she entered Norwegian territorial waters off Trondheim, seemingly to evade capture by the UK Royal Navy. She remained in Norwegian waters for two days, travelling some four hundred miles, including passage through the Bergen defensive area, in breach of Norway's domestic neutrality regulations. She was intercepted in the Norwegian territorial sea near the Joesing Fjord by a Royal Navy squadron which forcibly released her prisoners.<sup>74</sup> Norway and Germany objected that the UK had breached Norwegian neutrality, but the British claimed they were merely enforcing Norwegian neutrality in the face of Norwegian reluctance or inability to do so. The British did not contest *Altmark*'s entry into the Norwegian territorial sea. The gravamen of the British objection to her behaviour was her use of the neutral territorial sea to shelter, not entry per se.<sup>75</sup>

Accordingly, maritime neutrality law places no limits on belligerent warships' or auxiliaries' entry into neutral territorial sea, but it does regulate subsequent use. This seems an artificial division, but it is the only way of reconciling the States' positions in respect of the *Altmark*. It follows that circuitous voyages with no discernible navigational purpose undertaken in territorial seas will be in excess of mere passage and a breach of the law. Such voyages would violate the prohibition on seeking sanctuary. On the other hand, use of the territorial sea in a manner which is compliant with a passage right lawfully exercisable by a belligerent will not be a breach of the law, whatever the circumstances of entry.<sup>76</sup>

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73. SAN REMO MANUAL, *supra* note 26, r. 17; UK MANUAL, *supra* note 22, ¶ 13.9A.

74. Waldock, *supra* note 46, at 218–19.

75. *Id.* at 233.

76. A more recent example of a belligerent abusing passage rights in neutral territorial seas was the conduct of "manoeuvres" by Iranian forces in Saudi Arabian territorial waters during the Iran/Iraq War. This was a clear breach of the law apparently designed to deter Saudi Arabia from clandestine support of Iraq. For a brief discussion of that incident, see GEORGE K. WALKER, THE TANKER WAR 1980–88: LAW AND POLICY 268 (2000) (Vol. 74, U.S. Naval War College International Law Studies). Walker's analysis assumes the Iranian vessels enjoyed the right of innocent passage, but were acting in excess of it. This dissertation takes the view that belligerent Iran did not enjoy innocent passage in neutral Saudi territorial waters, but was instead acting in excess of a right of mere passage.

The foregoing analysis allows for a comparison to be drawn between innocent and mere passage. Figure 1 summarizes the salient features of each right:

FIGURE 1

<i><b>Innocent Passage</b></i>	<i><b>Mere Passage</b></i>
Applicable at all times, except to belligerent warships and auxiliaries in neutral States' territorial sea	Applicable only during an armed conflict, and only to warships and auxiliaries of belligerent States in neutral States' territorial sea
When applicable, exercisable by all vessels	When applicable, exercisable only by belligerent warships and auxiliaries
May be temporarily suspended in specified parts of the territorial sea on a non-discriminatory basis to vessels from all States for reasons of national security	May be restricted at the discretion of the neutral coastal State so long as restrictions are applied impartially to belligerent States, or it may be prohibited altogether
May not be prejudicial to the peace, good order or security of the coastal State	May not amount to basing naval operations or seeking sanctuary
Must be exercised continuously and expeditiously	Must be exercised continuously and expeditiously

In many situations, then, the rights of innocent and mere passage are very similar, if not identical. Indeed, prior to UNCLOS, many sources referred to the two interchangeably.<sup>77</sup> The German Commander's Handbook considers that mere passage should be exercised in accordance with the UNCLOS rules on innocent passage.<sup>78</sup> The main difference between the two is that the coastal State has a higher degree of discretion to restrict or prohibit mere passage than it does innocent passage.

## 2. Non-Suspendable Passage Rights

Hague XIII and UNCLOS both regulate territorial sea passage rights. UNCLOS does not interfere with the Hague XIII right of mere passage, but it does provide that transit passage, straits innocent passage and archipelagic sea lanes passage cannot be suspended by

77. TUCKER, *supra* note 46, at 235; Waldock, *supra* note 46, at 232 (quoting the UK's comments on the Norwegian neutrality proclamation in which it used the term "innocent passage" and the Norwegian government's response referring to the right of "mere" passage).

78. GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 246.

the neutral coastal State in any circumstances.<sup>79</sup> According to the 1969 Vienna Convention on the Law of Treaties, where successive treaties govern the same subject matter the earlier treaty applies only to the extent that its provisions are not incompatible with those of the later treaty.<sup>80</sup> Accordingly, a coastal State's neutrality is not impaired by a belligerent's exercise of non-suspendable rights, and a neutral coastal State may not impede belligerents in their enjoyment of them.<sup>81</sup>

While that is undoubtedly the position when both the coastal State and the passing belligerent State are parties to UNCLOS, the position when either State is not a party to UNCLOS is more complex. Colombia, El Salvador, Ethiopia, Iran, Peru, Turkey, Venezuela and the U.S. are parties to Hague XIII, but not UNCLOS.<sup>82</sup> Of these, the U.S. strongly asserts that the UNCLOS passage regime is reflective of customary law; Iran equally strongly asserts that only innocent passage and straits innocent passage are reflective of customary law.<sup>83</sup> If the U.S. position is correct, all belligerent States, whether UNCLOS parties or not, may enjoy the non-suspendable passage rights in the territorial sea of a neutral State. This would be the case regardless of whether the coastal State is a party to UNCLOS. If the Iranian view is correct, then where either the belligerent or coastal State is not a party to UNCLOS, the belligerent State may only enjoy straits innocent passage in addition to Hague XIII mere passage. The San Remo Manual and the Helsinki Principles can be read to support either view.<sup>84</sup> It has already been observed that the weight of academic opinion favours the more restrictive view espoused by Iran.<sup>85</sup>

### 3. Exercising Passage Rights: Defensive Measures

The manner in which a belligerent warship or auxiliary may exercise its passage rights is

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79. UNCLOS, *supra* note 32, arts. 38(1), 44, 45(2), 54. *See also* SAN REMO MANUAL, *supra* note 26, r. 23 & ¶¶ 23.1–23.3.

80. Where the parties to the later treaty are parties also to the earlier treaty. Vienna Convention on the Law of Treaties art. 30(3), May 23, 1969, 1155 U.N.T.S. 331.

81. SAN REMO MANUAL, *supra* note 26, r. 24; Helsinki Principles, *supra* note 10, princ. 2.3, cmt. at 503.

82. For Hague XIII parties, see *Treaties and States Parties to Such Treaties*, ICRC, <http://www.icrc.org/ihl.nsf/INTRO?OpenView> (follow Hague XIII hyperlink; then follow State party hyperlink) (last visited Jan. 8, 2014). For UNCLOS parties, see Status of UNCLOS, *supra* note 36.

83. *See supra* p. 12.

84. *See* SAN REMO MANUAL, *supra* note 26, r. 24 & ¶ 24.1; Helsinki Principles, *supra* note 10, princ. 2.3, cmt. at 503.

85. *See supra* p. 12.

controversial. It is clear that it must not commit any act which violates the State's neutrality; hostilities may not be conducted and visit and search is forbidden.<sup>86</sup> But the San Remo Manual states that: "Belligerents passing through . . . neutral straits or waters . . . are permitted to take defensive measures consistent with their security, including launching and recovery of aircraft, screen formation steaming, acoustic and electronic surveillance."<sup>87</sup> Military manuals surveyed also adopt this position.<sup>88</sup> NWP 1-14M and the German Commander's Handbook imply that the right to take defensive measures is based in the law of self-defence rather than the vessel's status as a belligerent. It is not clear whether the San Remo Manual provision contemplates that the right to take defensive measures stems from a State's rights as a belligerent or from a State's inherent right of self-defence. The self-defence basis is the correct one. The law is clear that belligerent measures (the conduct of hostilities) may not be undertaken in neutral territorial seas. However, the inherent right of self-defence applies at all times, even during an armed conflict and even when in another State's territory or territorial seas.<sup>89</sup> It is under the law of self-defence that the permissible extent of defensive measures by belligerents in neutral territorial seas must be considered. Self-defence allows a State to respond forcibly to an armed attack perpetrated against it.<sup>90</sup> An attack on a warship or other State vessel would *prima facie* amount to an armed attack, and permit a forcible response. If a State decides to respond to an armed attack with force, the response must satisfy three criteria: immediacy, proportionality and necessity.<sup>91</sup>

The ICJ considered allowable defensive measures during passage in the *Corfu Channel* case between the UK and Albania in 1949.<sup>92</sup> British warships were exercising straits innocent passage in the Corfu Channel in Albanian territorial waters when two of them struck mines. It does not matter that the *Corfu Channel* case concerned facts which occurred

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86. Hague XIII, *supra* note 7, art. 2.

87. SAN REMO MANUAL, *supra* note 26, r. 30.

88. UK MANUAL, *supra* note 22, ¶ 13.18; NWP 1-14M, *supra* note 23, ¶ 7.3.6; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 247. The Chinese Manual is silent on the matter.

89. It has recently been argued that individual units enjoy a right of self-defence under international law which is separate from States' rights of self-defence under U.N. Charter, Article 51. See Charles P. Trumbull IV, *The Basis of Unit Self-Defense and Implications for the Use of Force*, 23 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 121 (2012). For the traditional view that an individual unit's right of self-defence is derived from a State's Article 51 right, see YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE 243 (5th ed. 2011) ("it must be grasped that, from the standpoint of international law, all self-defence is national self-defence").

90. U.N. Charter art. 51.

91. See generally *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161 (Nov. 6).

92. *Corfu Channel*, *supra* note 38.

outside of an armed conflict, because the legal regime which governs the right to take defensive measures is the law of self-defence, not the law of armed conflict. The Albanian government had alleged that the passage of the UK warships was not innocent because the ships were manoeuvring and sailing in formation with soldiers on board, were at action stations, and the number of ships and their armament was intended by the British to intimidate Albania.

The Court found against Albania on each of these arguments. It found that the ships' sailing formation and being at action stations were proportionate defensive measures adopted in response to the known mine threat and the fact that previous British ships had been fired upon when sailing through the channel. The ships were carrying their usual detachments of marines, which did not affect the nature of the passage.<sup>93</sup> The Court concluded, however, that a subsequent passage of the strait by a British minesweeping force—done without the consent of the Albanian government and with the sole aim of sweeping mines—was a breach of Albanian sovereignty.<sup>94</sup> In its argument, the British government conceded that the minesweeping force was not exercising the right of innocent passage, choosing instead to justify the passage on other grounds.<sup>95</sup>

The *Corfu Channel* case shows that proportionate defensive measures are permitted, and supports the view that their legality falls to be judged under the self-defence rubric. The case is also indicative of the measures which will be considered proportionate in the factual circumstances faced by the British squadron. Nonetheless, the San Remo Manual provision was drafted in broad terms because the drafters struggled to agree on measures which would be lawful in three postulated scenarios.<sup>96</sup> In the discussion that follows of those scenarios, it will be assumed the belligerent forces within neutral waters are legitimately present; they will be referred to as “transiting forces.”

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93. *Id.* at 30–32.

94. *Id.* at 34–35.

95. The grounds argued were the exercise of a treaty right, to gather evidence for an international tribunal, and for the purpose of self-help/self-preservation; all were rejected by the Court in swift terms. *Id.* The present author considers that the self-help grounds was potentially justified and certainly warranted closer examination by the Court. See also John Norton Moore, *Jus ad Bellum Before the International Court of Justice*, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 903, 917–18 (2012).

96. SAN REMO MANUAL, *supra* note 26, ¶¶ 30.1–30.3.

*a. Defence by transiting forces of allied units outside neutral waters (including by organic aircraft).*

The San Remo Manual addresses the question of whether transiting forces in neutral territorial waters would be entitled to use force against enemy belligerent forces conducting attacks against other units from the transiting forces' State or allies.<sup>97</sup> It has already been observed that under the law of self-defence, States may take forcible measures which are proportionate, necessary and justified by the immediacy of an ongoing attack against their units and personnel. This general principle is unassailable. If these facts were to occur outside of an armed conflict, none would claim that the transiting forces' presence in a third State's territorial seas prevented them from taking lawful self-defence measures against the attacking forces. Such measures could include the launching of aircraft, use of sensors and firing of ordnance. In the author's view, this general principle is not displaced during an armed conflict. Accordingly, the transiting forces are entitled to take action in self-defence on behalf of other units while engaged in passage of neutral territorial seas.

*b. Measures by transiting forces in response to long-range missile attack against them by over the horizon enemy forces.*

The distance or over the horizon aspect of this scenario might be considered a red herring, but it does affect the range of responses which might be available to the attacked transiting forces. Doubtless, launching chaff and decoys or defensive manoeuvring would be permitted to defend the transiting forces from the missile attack. Similarly, use of a close-in weapon system to shoot down the inbound missile would be lawful. The more difficult question is whether, if those measures were sufficient to neutralize the missile attack, the transiting forces would be entitled to use force against the units which launched the missiles. If the missile attack had been successfully neutralized, then the law of self-defence would not permit a retaliatory attack. However, the transiting forces might be concerned that the attack upon them (itself a breach of the law while they are in neutral territorial sea) was evidence of a likely further attack. If the transiting forces' sensors were sufficiently capable, they might be able to glean further evidence as to whether the unit which attacked them was likely to continue the attack. The unit's posture, course and speed might all assist

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97. *Id.*, ¶ 30.2.



in making that determination. Launching an aircraft or a military device with the intention of gaining that evidence would be a lawful defensive measure in this author's view. If the evidence pointed to the conclusion that the attack had ceased (the attacking unit has fled the scene, for example) then it would no longer be necessary for the transiting force commander to use force, so it would be unlawful for him to do so under self-defence. Indeed, unless there was positive evidence that further attack on his units was imminent, there would be no grounds for the commander to use force until he was outside of neutral territorial waters and once again able to conduct hostilities.

*c. Measures by transiting forces in response to a submarine lying in wait outside neutral waters.*

This is the hardest of the three scenarios to assess. If the enemy submarine is acting in accordance with the law, then it is not a threat to the transiting forces until they exit neutral territorial seas. However, at the time of exit, it constitutes an immediate threat and there might be insufficient time for the transiting force commander to neutralize it before that threat manifests itself. Furthermore, the transiting force commander will obviously not know whether the submarine commander plans to abide by the law or not. The law of self-defence does not require a State to absorb a first blow, which could be potentially fatal, before it may use force in self-defence.<sup>98</sup> Where the threat of an armed attack is imminent and overwhelming, then the potential victim is entitled to take proportionate and necessary measures before the attack occurs. That logic would permit the transiting forces to use force against the submarine only if it constitutes a sufficiently imminent threat. The behaviour of the submarine would be key in making this determination. For example, if sonar data indicated the submarine had flooded its torpedo tubes, this would indicate that an attack was imminent.

Lesser measures open to the commander include tactical manoeuvring (such as steering an erratic zig-zag course to make it harder for the submarine to obtain a firing solution). This would plainly be lawful. Other non-forcible measures open to the transiting force commander bring their own difficulties. If the forces remained in neutral territorial waters in the hope that the submarine left, they would be at risk of being in excess of mere

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98. Whether this is described a right of "pre-emptive" self-defence depends on the stage at which the armed attack is defined as having started. *See generally* DINSTEIN, *supra* note 89, at 201–7.

passage and breaching the sanctuary rule. If they turn back, then they have forfeited the freedom of navigation intentionally preserved in the rules on belligerent passage. Depending on the geography of the particular conflict, this could have the perverse effect that a submarine lurking at the edge of territorial seas could become virtually immune from attack under the law, yet while achieving a significant sea denial effect upon the enemy.

B. *Neutral Vessels' Passage Rights in Belligerent Territorial Seas*

The law which applies between belligerents and neutrals is *prima facie* the law of peace.<sup>99</sup> Subject to the belligerent coastal State's right temporarily to suspend innocent passage for reasons essential to national security, neutrals appear to enjoy the full suite of peacetime passage rights in belligerent territorial seas. The San Remo Manual adopts this position, but suggests that neutrals inform a belligerent of the passage prior to exercising any of these rights although it is clear that this is hortatory only and not an obligation.<sup>100</sup> However, there is some State practice to the contrary. Many international straits in belligerent territorial seas were mined during the Second World War and closed to merchant shipping. Some national manuals seem to accept that belligerents retain a right to restrict, even if not suspend altogether, passage through straits during an armed conflict. This runs counter to the plain text of UNCLOS, but does garner some support from scholars.<sup>101</sup>

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99. See, e.g., Helsinki Principles, *supra* note 10, princ. 1.3., cmt. at 499.

100. SAN REMO MANUAL, *supra* note 26, r. 26, ¶ 26.2.

101. GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 377; Wolff Heintschel von Heinegg, *The Law of Naval Warfare and International Straits*, in *THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM* (Michael N. Schmitt & Leslie C. Green eds., 1998) (Vol. 71, U.S. Naval War College International Law Studies).

## PART TWO: BELLIGERENTS' RIGHTS AND OBLIGATIONS IN NEUTRAL PORTS

Delegates disagreed on the acceptable scope of belligerent activity in neutral ports at the Hague Conference.<sup>102</sup> Britain, with its many and widespread colonial possessions, did not need to rely upon neutral ports for logistical support. It was much readier to condemn their use as basing operations than, say, France, which regarded such support merely as the provision of “offices of humanity” by the neutral State. Consequently, the rules in Hague XIII are the result of compromise.

Some rules are relatively uncontroversial. For example, a belligerent is under a specific duty not to establish a prize court in neutral territory or territorial waters.<sup>103</sup> Belligerents may not replenish war material or armament, or complete their crews in neutral ports or territorial seas.<sup>104</sup> These rules will not be examined further.<sup>105</sup> Four aspects of belligerent use of neutral ports warrant closer analysis, however: refuelling, taking on provisions and fresh water (or “revictualing”), the conduct of repairs and the twenty-four hour rule. Each will be examined in turn.

### A. *Refuelling*

Hague XIII, Article 19, provides:

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102. JAMES B. SCOTT, THE REPORTS OF THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, at 861–62 (1909) [hereinafter HAGUE REPORTS].

103. Hague XIII, *supra* note 7, art. 4. Interestingly, this rule is not reflected in the manuals surveyed, except the CHINESE MANUAL, *supra* note 25, at 261. In the writer’s opinion, there is no reason to doubt this remains a rule of international law. Marsden dates the rule as far back as 1694. R. G. Marsden, *Early Prize Jurisdiction and Prize Law: Part III*, 26 THE ENGLISH HISTORICAL REVIEW 34, 46 (1911) [hereinafter Marsden, *Early Prize Law: Part III*].

104. Hague XIII, *supra* note 7, art. 18; Helsinki Principles, *supra* note 10, princ. 2.2; NWP 1-14M, *supra* note 23, ¶ 7.3.2.2; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 239; CHINESE MANUAL, *supra* note 25, at 261. The rule is reflected only obliquely in the SAN REMO MANUAL, *supra* note 26, r. 20(c). The drafters considered that Rule 20(c) was sufficient to give effect to Article 18. *Id.*, ¶ 20.2(c). The UK MANUAL, *supra* note 22, ¶ 13.9C.b, adopts the San Remo Manual position.

105. Another belligerent duty, the duty to abstain from any act which would constitute a violation of the coastal State’s neutrality, has already been discussed in the context of passage rights. *See supra* pp. 20-25. *See also* Hague XIII, *supra* note 7, arts. 1-2; SAN REMO MANUAL, *supra* note 26, r. 15, 16; Helsinki Principles, *supra* note 10, princ. 1.4; UK MANUAL, *supra* note 22, ¶¶ 13.8–9; NWP 1-14M, *supra* note 23, ¶¶ 7.3, 7.3.4; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 243.

[Belligerent war-ships] may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

Further refuelling may not take place in a port in the same neutral State within three months.<sup>106</sup> The San Remo Manual proposes, contrary to Article 19, that topping up should be eschewed for the “more objective and determinable standard” of “being able to reach a port of its own territory.”<sup>107</sup> The Helsinki Principles do not address the issue specifically, but say generally that the “right of passage and sojourn of belligerent warships in neutral waters and ports is governed by [Hague XIII], which reflect[s] customary law.”<sup>108</sup> The UK Manual adopts the San Remo position.<sup>109</sup> NWP 1-14M, the German Commander’s Handbook and the Chinese Manual all prefer to leave the matter entirely to the discretion of the neutral State.<sup>110</sup>

While unsatisfactory from the perspective of legal certainty, two arguments suggest that, in practice, the lack of clarity makes little difference. First, even were a belligerent warship to take sufficient fuel to reach a home port, she would be under no obligation actually to go home rather than re-join the hostilities. Such a provision was deliberately excluded from Hague XIII.<sup>111</sup> Second, the distance of many warships’ theatres of operations from home may well mean that the standards are, in reality, the same. Accordingly, contrary to the San Remo and UK positions, the better rule is to allow topping up. It is a clearer and more objective standard than obliging the neutral State to assess how much fuel a belligerent warship would use to get to a home port, especially when this volume will vary depending on speed, weather, climate or class of ship. The rule limiting repeated refuelling in the same neutral State is the more onerous to belligerents, is clear in its effect and is a better safeguard against excessive belligerent use of neutral port facilities.

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106. Hague XIII, *supra* note 7, art. 20.

107. SAN REMO MANUAL, *supra* note 26, ¶ 20.2(c).

108. Helsinki Principles, *supra* note 10, princ. 2.2, cmt. at 502.

109. UK MANUAL, *supra* note 22, ¶ 13.9C.

110. NWP 1-14M, *supra* note 23, ¶ 7.3.2.2; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 240; CHINESE MANUAL, *supra* note 25, at 263.

111. Despite being pressed for by the British delegate. HAGUE PROCEEDINGS VOL. III, *supra* note 8, at 639.

B. *Revictualing*

Hague XIII, Article 19, provides “Belligerent war-ships may only re-victual in neutral ports or roadsteads to bring up their supplies to the peace standard.” Neutral States have no discretion to adopt a uniform topping up policy in respect of victuals as they do with fuel. Neither does the three-month resupply limit apply to victuals. Indeed, victuals are measured completely differently than fuel. The maximum resupply allowed is the peace standard. The practice of setting a ship’s victualing capacity by peace and war standards now seems anachronistic. In the UK Royal Navy victualing endurance is set according to the ship’s expected tasking (or readiness state) rather than by peace or war.<sup>112</sup> As well as being anachronistic, these standards are rather opaque. They are defined by the warship’s flag State and, for understandable reasons, are often classified information. The peace standard is, therefore, often indeterminable by the neutral port authorities and is an inappropriate basis for the law. As navies move away from setting victualing capacity by peace or war standards, the peace standard limit in Hague XIII is likely to fall into desuetude,<sup>113</sup> if it has not already.

The unsuitableness of the peace standard means that there is significant divergence among contemporary references as to what limit does apply to revictualing. The Helsinki Principles maintain Article 19 still reflects the law, whereas the San Remo Manual provides that the same “enough to get you home” standard that applies to fuel should apply to victuals. The UK Manual reflects the San Remo position, while the other manuals surveyed prefer to leave the matter to neutral States’ discretion.<sup>114</sup> The difference between the various approaches matters more in the context of victuals than fuel. Topped up, many warships of frigate and destroyer size will have the capacity to carry beyond sixty or seventy days’ worth of food, while their fuel carrying capacity is much more limited. Topping up victuals amounts to a far greater increase in a warship’s sustainability on operations than topping up fuel, but it is difficult to recommend a clearer, more objective limit. The “peace” and “enough to get you home” approaches are opaque and unsatisfactory.

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112. 1 MINISTRY OF DEFENCE, DEFENCE CATERING MANUAL arts. 1301–8 (5th ed. 2011).

113. For the concept of desuetude, see, e.g., Michael J. Glennon, *How International Law Dies*, 93 GEORGETOWN LAW JOURNAL 939 (2005).

114. Helsinki Principles, *supra* note 10, princ. 2.2; SAN REMO MANUAL, *supra* note 26, ¶ 20.2(b). UK MANUAL, *supra* note 22, ¶ 13.9C.b; NWP 1-14M, *supra* note 23, ¶ 7.3.2.2; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 240; CHINESE MANUAL, *supra* note 25, at 263.

Accordingly, this writer recommends that victuals be subject to the same rules as fuel, that is topping up is permitted, but resupply from the ports of the same neutral State is forbidden within three months.

### C. *Repairs*

Hague XIII, Article 17, provides:

In neutral ports and roadsteads war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

Under the strict wording of the Convention, it does not matter whether the damage in need of repair occurred by stress of weather or by enemy action.<sup>115</sup> So long as the repairs are limited to what is absolutely necessary for seaworthiness, repair seems to be permitted.

By the 1930s, however, international and domestic law began to demonstrate a consensus against permitting battle damage repair. For instance, Article 9 of the 1928 Havana Convention on Maritime Neutrality<sup>116</sup> forbade battle damage repair altogether. The Havana Convention's applicability was limited by the fact that it was only ratified by the United States and seven other States, all of which are located in the Americas.<sup>117</sup> The 1938 neutrality codes of the Scandinavian countries (Denmark, Finland, Iceland, Norway and Sweden) and the U.S. president's proclamation of neutrality on September 5, 1939 also prohibited battle damage repair.<sup>118</sup> The 1939 Harvard Draft Convention, an academic project undertaken by a group of scholars at Harvard University, similarly forbade it.<sup>119</sup>

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115. The contemporaneous record does not report any discussion of this issue among delegates. HAGUE REPORTS, *supra* note 102, at 858.

116. Convention on Maritime Neutrality, Feb. 20, 1928, 135 L.N.T.S. 187.

117. *Treaties and States Parties to such Treaties*, ICRC, [http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=290](http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=290) (last visited Jan. 8, 2014) [hereinafter Treaty Parties].

118. These codes and proclamations are reproduced in PAYSON S. WILD JR., INTERNATIONAL LAW SITUATIONS 44–46 (1939). The U.S. had also refused to allow battle damage repairs to Russian ships during the Russo-Japanese War in 1904–5. See Charles C. Hyde, *The Hague Convention Respecting the Rights and Duties of Neutral Powers in Naval War*, 2 AMERICAN JOURNAL OF INTERNATIONAL LAW 507, 520 (1908).

119. Harvard Draft Convention with Commentary, *supra* note 30, art. 34. The Convention's commentary surveys State practice from the First World War and nineteenth century conflicts, which is inconclusive. The commentary does not explicitly state why the drafters adopted the position they did. *Id.* at 462–72.

During the Second World War, this emerging consensus against battle damage repair was undermined by the *Admiral Graf Spee* incident, which will be examined presently. The law on whether battle damage repair is permitted or not remains in dispute.<sup>120</sup> The San Remo Manual's Rule 20(c) reflects Hague XIII's silence on the point. The UK Manual adopts the text of Rule 20(c) verbatim.<sup>121</sup> NWP 1-14M simply records that the law is unsettled.<sup>122</sup> The German and Chinese manuals are silent on the issue.

An unseaworthy belligerent warship is not required to leave a neutral port. Rather, as provided by Hague XIII, Article 24, the neutral power is obliged to “take such measures as it considers necessary to render the ship incapable of taking the sea during the war.” Where a ship is interred pursuant to Article 24, so too must be its crew for the remainder of hostilities. The Harvard Draft Convention similarly provided that “a condition of distress which is the result of enemy action may not be remedied and if the vessel is unable to leave, it shall be interned.”<sup>123</sup>

The *Graf Spee* incident partially illustrates these rules.<sup>124</sup> In December 1939, following an engagement with a Royal Navy squadron, the German battleship *Graf Spee* put into the neutral Uruguayan port of Montevideo. The British insisted that the ship be made to leave as soon as possible.<sup>125</sup> They relied upon Hague XIII, Articles 12, 14 (which provides that extended stay in neutral ports may only be granted on account of damage or stress of weather) and 24. Great Britain did not expressly rely on Article 17, probably because its position on battle damage repair was not clear. The commanding officer of the *Graf Spee*, Captain Langsdorff, requested to stay for a period of fourteen days in order to effect repairs.

While Uruguay was a party to the 1928 Havana Convention, Britain and Germany were not, so its express prohibition on battle damage repair was inapplicable.<sup>126</sup> Uruguay

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120. SAN REMO MANUAL *supra* note 26, ¶ 20.2(c).

121. UK MANUAL, *supra* note 22, ¶ 13.9C.

122. NWP 1-14M, *supra* note 23, ¶ 7.3.2.2.

123. Harvard Draft Convention with Commentary, *supra* note 30, art. 34.

124. The following facts are taken from TUCKER, *supra* note 46, at 245 n.2, and Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEXAS INTERNATIONAL LAW JOURNAL 294, 305 (2011).

125. The British position was initially that the *Graf Spee* should be required to leave “immediately,” but this position was relaxed for operational reasons to allow the cruiser *Cumberland* to arrive at the scene before the *Graf Spee* sailed. Lewis, *supra* note 124, at 305 n.71.

126. See Treaty Parties, *supra* note 117. Uruguay was also not represented at the Consultative Meeting of Foreign Ministers of the American Republics that prepared the 1939 Pan-American Declaration of Neutrality. In any event, that declaration was silent on the question of battle damage repair. See *Consultative Meeting of*

determined that, under Hague XIII, it was only obliged to prevent repairs that increased the vessel's fighting capability and did not consider itself bound to prevent seaworthiness repairs which were the result of enemy action. Uruguay exercised its Hague XIII, Article 17, right to assess the extent of the repairs necessary. The inspectors concluded that seventy-two hours would be sufficient and that *Graf Spee* would be obliged to depart on December 17. After that time, if the ship was still present in Montevideo, it would be interred. Interestingly, no party seems to have taken issue with the accuracy or fairness of the inspectors' decision, implying that they regarded Uruguayan port authorities as the proper arbiter of what repairs were absolutely necessary within the meaning of Article 17. However, the German authorities were unpersuaded that seventy-two hours was sufficient. Langsdorff was ordered by the German government to avoid internment at all costs and that he should attempt to break out or scuttle the ship. He waited until the end of his allotted seventy-two hours and then scuttled the ship in the River Plate on December 17. The crew was interred for the remainder of the war. Langsdorff later committed suicide.

The case of the *Graf Spee* illustrates the consequences of abusing neutral ports' hospitality, but brings little clarity to the battle damage repair rule. The interwar consensus, if it can be called that, against allowing battle damage repairs was accepted in neither word nor practice by the protagonists in the *Graf Spee* affair (none argued in favour of the prohibition).

What might be the jurisprudential basis for forbidding battle damage repairs? If, instead of managing to limp into port, the warship had sunk and the neutral State had rescued the crew, the neutral State would have been obliged to inter them until the end of the conflict or otherwise ensure they could take no further part in hostilities.<sup>127</sup> A ship rendered unseaworthy, even if not sunk, by enemy action should be considered lost. It is not the role of a neutral State to assist a belligerent in reversing that fact. As a matter of *lex ferenda*, these considerations probably tip the balance in favour of a prohibition against battle damage repair in neutral ports. However, the state of the present law is unclear.

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*Foreign Ministers of the American Republics—Final Act*, 34 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 1, 10 (1940).

127. Hague XIII, *supra* note 7, art. 24. See further OPPENHEIM VOL. II, *supra* note 5, at 471–73.



D. *The Twenty-Four Hour Rule*

The twenty-four hour rule is found in Hague XIII, Article 12: “In the absence of special provision to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads or territorial waters of the said Power for more than twenty-four hours, except in cases covered by the present Convention.” The San Remo Manual and the Helsinki Principles reflect the twenty-four hour rule in Article 12 terms.<sup>128</sup>

The UK position, however, is that the rule no longer reflects the law in view of modern State practice.<sup>129</sup> This bold statement seems surprising. It is in stark contrast to other national manuals surveyed, which expressly recognize the rule.<sup>130</sup> On further examination, though, the British position is not the outright rejection of the rule that it first seems, but a geographical qualification. If, for example, the UK was engaged in an armed conflict in the Arabian Gulf, a Royal Navy warship engaged in other peacetime operations in the Caribbean and making no contribution to operations in the Gulf is not, on the British view, prevented from staying in a Caribbean port in excess of twenty-four hours. Such a visit would not impact on the campaign in the Gulf and so application of the rule is unnecessary.<sup>131</sup> It is curious the UK Manual should choose the twenty-four hour rule, but no other, in making this geographical argument. If the principle is sound, there is no reason why geography should not limit every other rule of maritime neutrality. Despite the claim that this interpretation of the rule is based on observance of modern State practice, the lack of acceptance of a geographical limit in other prominent national manuals means it cannot be considered as reflective of customary law.

Assuming the twenty-four hour rule remains applicable, under Hague XIII it is only a default position. It only applies when the neutral State has declined to legislate a different period. Once again, what would otherwise have been an impasse at the Hague Conference

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128. SAN REMO MANUAL, *supra* note 26, r. 24; Helsinki Principles, *supra* note 10, princ. 2.2.

129. UK MANUAL, *supra* note 22, ¶ 13.4. This position on the twenty-four hour rule was adopted by several States in the negotiations at the Second Hague Peace Conference. Ironically, it was opposed by Great Britain. HAGUE REPORTS, *supra* note 102, at 848–54.

130. NWP 1-14M, *supra* note 23, ¶ 7.3.2.1; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 246; CHINESE MANUAL, *supra* note 25, at 263.

131. This argument is taken from Steven Haines, *The United Kingdom’s Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared*, 36 ISRAEL YEARBOOK ON HUMAN RIGHTS 89, 103–4 (2006).

in 1907 was resolved by providing a default rule, but ultimately leaving the matter to neutral States to determine for themselves as long as they did so impartially between the belligerents.<sup>132</sup>

Article 12's phrase "except in cases covered by the present Convention" creates ambiguity. Where the Convention makes express derogation from the twenty-four hour rule, there is no difficulty. For example, where a neutral port is unable to furnish a belligerent warship with fuel<sup>133</sup> within twenty-four hours of its arrival, the twenty-four hour rule is extended by a further twenty-four hours.<sup>134</sup> Also, where opposing belligerent vessels are in the same neutral harbour, the neutral State may impose a twenty-four hour interval between their departures.<sup>135</sup>

However, the way in which the twenty-four hour rule interacts with the rules on belligerent passage in neutral territorial sea is less clear. The right of mere passage is covered by Hague XIII in Articles 9 and 10, but there is no express requirement that passage must take less than twenty-four hours. The modern non-suspendable passage rights—transit passage, straits innocent passage and archipelagic sea lanes passage, discussed in Part One—are obviously not covered by Hague XIII.<sup>136</sup> In the Second World War, the States-party to the Pan-American General Declaration of Neutrality of October 3, 1939 concluded that *all* belligerent passage was subject to a twenty-four hour time limit.<sup>137</sup> This was qualified in respect of passage through the Panama Canal, however, because it was simply not possible to transit the Canal and Panamanian territorial waters in less than twenty-four hours. The annexed Neutrality Proclamation to the Canal Zone therefore allowed the time taken to transit the Canal to be added to the twenty-four hour period otherwise granted on the grounds of necessity.<sup>138</sup>

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132. NEFF, *supra* note 9, at 133.

133. The word the Convention uses is "coal," but it is hopefully not too controversial to construe this as "fuel."

134. Hague XIII, *supra* note 7, art. 19.

135. *Id.*, art. 16. For historical examples of this rule being enforced, see R. G. Marsden, *Early Prize Jurisdiction and Prize Law: Part II*, 25 THE ENGLISH HISTORICAL REVIEW 243 (1911) [hereinafter Marsden, *Early Prize Law: Part II*]; Marsden, *Early Prize Law: Part III*, *supra* note 103, at 48.

136. See *supra* pp. 19-20.

137. General Declaration of Neutrality of the American Republics ¶ 3(d), Oct. 3, 1939, 3 Bevans 604, reprinted in 34 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 9 (1940).

138. Regulations Concerning Neutrality in the Canal Zone, Proclamation No. 2350, 4 Federal Register 3821 (Sept. 9, 1939), reprinted in 34 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 28, 29 (1940).

The Helsinki Principles use a formulation similar to the Canal Zone proclamation in describing belligerent passage rights. They assert the applicability of the twenty-four hour rule to mere passage, but permit the exercise of the non-suspendable passage rights for periods in excess of twenty-four hours “where the time ordinarily needed for this passage is more than 24 hours.” The Helsinki Principles rely on the UNCLOS formulation that such passage must be continuous and expeditious to limit any belligerent abuse of neutral territorial sea.<sup>139</sup> On a first reading, the San Remo Manual appears to apply the twenty-four hour rule to Hague XIII mere passage, but not to the non-suspendable passage rights. Rule 21 states:

[A] belligerent warship or auxiliary vessel may not extend the duration of its passage through neutral waters . . . for longer than 24 hours unless [this is] unavoidable on account of damage or the stress of weather. The foregoing rule does not apply in international straits and waters in which the right of archipelagic sea lanes passage is exercised.<sup>140</sup>

Rule 21 says bluntly that the twenty-four hour rule “does not apply” in international straits and archipelagic sea lanes, whereas the Helsinki Principles permit an exception to the rule only when the normal time taken for such passage is more than 24 hours. However, the San Remo Manual’s explanation makes clear that Rule 21 is intended to be construed in the same way as the rule is stated in the Helsinki Principles.<sup>141</sup>

The justification for the application of the twenty-four hour rule to passage is clear—belligerent forces are forbidden from using neutral waters (whether archipelagic, in international straits or elsewhere) as a safe haven or as a base of operations.<sup>142</sup> Where the twenty-four hour rule is breached, it may be presumed that either the base of operations or sanctuary prohibitions have also been breached. This presumption is rebuttable only when a belligerent warship is exercising a non-suspendable passage right and it would normally take longer than twenty-four hours to complete the passage.

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139. Helsinki Principles, *supra* note 10, princ. 2.2, 2.4, cmt. at 502.

140. SAN REMO MANUAL, *supra* note 26, r. 21.

141. *Id.*, ¶¶ 21.1–21.2.

142. Helsinki Principles, *supra* note 10, cmt. at 502.

### PART THREE: BELLIGERENT CONTROL OF NEUTRAL TRADE

Belligerents have long sought to deny their enemies resources which sustain their war effort. One way of doing this is to strangle the enemy's ability to import war-sustaining resources from overseas, whether from neutral States or from enemy overseas possessions or colonies. Since, even now, so much trade is carried by sea, this task has always fallen to maritime forces. Hague XIII prevents neutral States from supplying belligerents with war material, but expressly preserves the rights of neutral private citizens to continue trading with belligerents, even in material which aids the belligerent war effort.<sup>143</sup> Nonetheless, they do so at their own risk, because belligerents are entitled to seize and confiscate items of contraband. Contraband is any item which is (a) *useful* to the enemy in waging its war and (b) actually *destined* to reach the enemy.

Historically, belligerents also sought to control their enemies' trade with their colonies. Usually this trade was confined to vessels flagged to the belligerent colonial power. These vessels, enemy in character, could be captured as of right. However, in order to place this trade beyond the reach of their enemy, belligerents allowed neutrals to carry colonial trade, even though this was a trade usually closed to them. Innovative prize courts created the Rule of 1756 to justify capturing neutral vessels engaged in belligerent colonial trade. These two rules—contraband and the Rule of 1756—are the subject of this Part.

#### A. *Contraband*

Contraband controls were last employed extensively during the First and Second World Wars. Since then they have been used only sparingly: the Arab-Israel conflict from 1948 to 1979 and the brief conflicts between India and Pakistan in 1965 and 1971.<sup>144</sup> Given the lack of recent State practice, much of the law is rather old. In fact, it was considered old even

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143. Hague XIII, *supra* note 7, arts. 6–7.

144. There is evidence of Russian controls on Georgian trade at sea during the 2008 conflict, but the nature of these controls is unclear. Some news sources claim Russia established a blockade. *Russian Navy Blockade Georgia*, CHINA VIEW (Aug. 10, 2008), [http://news.xinhuanet.com/english/2008-08/10/content\\_9138604.htm#prof](http://news.xinhuanet.com/english/2008-08/10/content_9138604.htm#prof). The 2009 Report by the Independent International Fact-Finding Mission on the Conflict in Georgia claimed instead that the Russian Black Sea Fleet established a maritime security zone. See 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA, REPORT 212 (2009), available at [http://www.ceiig.ch/pdf/IIFFMCG\\_Volume\\_II.pdf](http://www.ceiig.ch/pdf/IIFFMCG_Volume_II.pdf) [hereinafter FACT-FINDING REPORT].

prior to the outbreak of the First World War. As noted by one commentator, “in 1914 [in the UK] the law of prize stood . . . virtually where it was left by Lord Stowell at the end of the Napoleonic Wars.”<sup>145</sup> Nonetheless, rules on contraband are contained in modern military manuals and there is nothing which yet indicates that States believe that contraband law has fallen into desuetude.

As far back as the thirteenth century, belligerents intercepted goods destined for their enemies and pre-emptively purchased them from the neutral carrier (by the payment of freight money).<sup>146</sup> Interference with enemy goods in neutral shipping was eventually outlawed in the 1856 Declaration of Paris, which provided that “The neutral flag covers enemy’s goods with the exception of contraband of war.”<sup>147</sup> This rule, known as the “free ship, free goods” principle, meant that belligerents could not interfere with private neutral traders even if they were carrying their enemies’ goods. However, contraband of war was preserved as an exception and was subject to capture and condemnation as prize. Neutral States were prepared to tolerate this exception partly because the acts of the neutral carriers caught carrying contraband were not attributed to their government. Private traders bore responsibility and loss themselves. By the early 1900s, this was well known as the “commercial adventure” principle.<sup>148</sup>

Disagreement at the 1907 Second Hague Peace Conference precluded the inclusion of any provisions on contraband in Hague XIII.<sup>149</sup> The 1909 Declaration of London did contain detailed provisions on contraband, but it was never ratified. Commitments to abide by it on both sides in the First World War were soon abandoned.<sup>150</sup> By 1909, the two classifications of goods—arms and ammunition, and dual-use goods—were universally

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145. G. G. Fitzmaurice, *Some Aspects of Modern Contraband Control and the Law of Prize*, 22 BRITISH YEARBOOK OF INTERNATIONAL LAW 73, 74 (1945). For a fascinating account of the influence of the decisions of the English Prize Court in the early 1800s, see EDWARD S. ROSCOE, LORD STOWELL—HIS LIFE AND THE DEVELOPMENT OF ENGLISH PRIZE LAW (1916).

146. In England this was done by “portsmen” under notional control of a regional port admiral. They were most charitably characterized as privateers and were a law unto themselves, but aggrieved parties did occasionally complain about their conduct to the Crown and achieved the restoration of their property. The first *judicial* prize condemnation seems to have been in 1426. See R. G. Marsden, *Early Prize Jurisdiction and Prize Law: Part I*, 24 THE ENGLISH HISTORICAL REVIEW 675, 681–82 (1909) [hereinafter Marsden, *Early Prize Law: Part I*].

147. Declaration of Paris art. 2, Apr. 16, 1856, 115 Consol. TS 1, 15 Martens Nouveau Recueil (ser. 1) 791, reprinted in 1 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 89 (1907).

148. NEFF, *supra* note 9, at 20.

149. HAGUE PROCEEDINGS VOL. III, *supra* note 8, at 1111.

150. See, e.g., British Orders-in-Council dated March 11, 1915 and February 1, 1917. These were the subject of litigation in *The Leonara* [1918] P. 182.

accepted as absolute and conditional contraband, respectively. Absolute contraband could be seized as long as it was consigned to an address or recipient in territory belonging to or controlled by the enemy, no matter whether the specific recipient within that territory was a government official or a private person. The circumstances in which conditional contraband could be seized were stricter. It could be seized only if it was destined specifically for the enemy belligerent's government or armed forces within enemy controlled territory. Such specific destination could be presumed if the articles were consigned to a known government contractor, or if the goods were consigned to a "fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy."<sup>151</sup>

Because an item's utility in any given armed conflict would depend on the circumstances of that conflict, belligerent States would set out, in published lists, items they would consider to be absolute and conditional contraband liable to seizure.<sup>152</sup> Goods not included in the lists were considered "free" under the Declaration of Paris. Listing, therefore, came to be a lawful requirement before items could be seized as contraband, although it is not clear when this requirement crystalized into law. It was accepted without question at the London Conference in 1909.<sup>153</sup> However Sir William Scott's prize decisions in the late eighteenth and early nineteenth centuries make no reference to the requirement of a contraband list.<sup>154</sup>

This Part will first consider the three criteria for establishing that an item is contraband: prior publication in a list, qualification as an item of absolute or conditional contraband and enemy destination. It will then consider the penalties which have been imposed by prize courts in contraband cases, before assessing how the law is likely to develop in future.

## 1. Contraband Lists

The San Remo Manual requires belligerents to publish in advance "reasonably specific" lists of goods they consider to be contraband in the circumstances of the particular armed

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151. Declaration Concerning Laws of Naval War arts. 30, 33, 34, Feb. 26, 1909, 208 Consol. T.S. 338 [hereinafter Declaration of London].

152. An early example was the war between the United Provinces and the Spanish Netherlands in 1589. It is described in Marsden, *Early Prize Law: Part I*, *supra* note 146, at 692.

153. Declaration of London, *supra* note 151, arts. 22–25.

154. *See, e.g., The Ringende Jacob* (1798) 1 C. Rob. 89.

conflict.<sup>155</sup> The UK Manual and the German Commander's Handbook reflect the San Remo Manual position.<sup>156</sup> NWP 1-14M observes the requirement for lists, but opines that it may be satisfied by the publication of a list of "free" goods.<sup>157</sup> The U.S. approach seems to leave more latitude to the belligerent State and provide less certainty for neutral carriers. If reasonably specific lists are the law, the free goods approach would likely not be sufficient to satisfy that standard.

In the post-Second World War conflicts in which belligerents have employed contraband controls, State practice indicates that it is the more onerous requirement to publish affirmative lists of contraband that best reflects the law. For instance, during its conflict with Israel which began in 1948, Egypt, having initially denied that contraband lists were required at all, subsequently published affirmative lists.<sup>158</sup> In the conflict between India and Pakistan in 1971, both sides published affirmative contraband lists.<sup>159</sup>

Even when drafting affirmative lists, however, States enjoy broad discretion as to which items they list as contraband. Indeed, while still neutral, the U.S. protested against the UK's long contraband lists in both world wars.<sup>160</sup> It is, therefore, easy to see why NWP 1-14M places relatively little store by the contraband list as a limit on belligerent contraband controls. Against that, it might be argued that at least the requirement of a published affirmative list gives neutral States the opportunity to protest against the listed items.

## 2. Absolute and Conditional Contraband

The distinction between absolute and conditional contraband was prescribed in the 1909 Declaration of London. The Declaration listed certain items which would automatically

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155. SAN REMO MANUAL, *supra* note 26, r. 149.

156. UK MANUAL, *supra* note 22, ¶ 13.109; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 260. The Chinese Manual is silent on the issue of lists.

157. NWP 1-14M, *supra* note 23, ¶ 7.4.1.

158. See Thomas D. Brown Jr., *World War Prize Law Applied in a Limited War Situation: Egyptian Restrictions on Neutral Shipping with Israel*, 50 MINNESOTA LAW REVIEW 849, 857–58 (1966).

159. See Contemporary Practice of the United States Relating to International Law, *Belligerent Interference with Neutral Commerce*, 66 AMERICAN JOURNAL OF INTERNATIONAL LAW 386, 386–87 (1972) for both States' lists, which were published in December 1971. Neither side had published a list in the 1965 conflict.

160. TUCKER, *supra* note 46, at 264 n.3; Meeting of the Foreign Ministers of the American Republics, Resolution on Contraband of War (Oct. 3, 1939), *reprinted in* 34 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 13, 14 (1940).

qualify as absolute or conditional contraband without the need for notice in lists.<sup>161</sup> However, it allowed belligerents the discretion to add other items by publishing lists.<sup>162</sup> Perusal of the items listed in the Declaration demonstrates the futility of attempting specifically to catalogue contraband items in an international agreement. Many items seem quaint in the modern context and would surely not be considered contraband today. For example, “all kinds of harness” and “horseshoes and shoeing materials” automatically qualify as contraband under the Declaration.<sup>163</sup> The problem of the list becoming dated was recognized as the Declaration was being drafted. Spain proposed, by way of a solution, that there should be consensual periodic review of the lists in the Declaration. Given, however, that it was troublesome enough to persuade States to agree on the lists in time of peace, it was rightly concluded that, were a review to fall during a period of hostilities, agreement would prove impossible. The idea was, accordingly, rejected.<sup>164</sup>

The line between absolute and conditional contraband was blurred by belligerent practice in the world wars. It was contended by both sides in both conflicts that it was impossible to distinguish between goods intended for armed forces’ consumption and goods intended for civilian consumption.<sup>165</sup> The practice of government rationing of goods available on the civilian market added to the difficulty. In the Arab-Israeli conflict Egypt initially maintained a distinction between absolute and conditional contraband, but later in the conflict its prize court abandoned it.<sup>166</sup> Moreover, during the conflict between India and Pakistan in 1971, the lists drawn up by both parties made no distinction between absolute and conditional contraband.<sup>167</sup> The San Remo Manual eschews any contemporary distinction between absolute and conditional contraband; the Helsinki Principles and UK

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161. Declaration of London, *supra* note 151, arts. 22, 24 (absolute and conditional contraband, respectively). See also James B. Scott, *The Declaration of London of February 26, 1909: Part I*, 8 AMERICAN JOURNAL OF INTERNATIONAL LAW 274, 305–9 (1914).

162. Declaration of London, *supra* note 151, arts. 23, 25.

163. *Id.*, arts. 22(6) & 24(12), respectively. Against this view, it must be conceded that in 1971 India’s contraband list did include “all kinds of harness of a military character.” *Belligerent Interference with Neutral Commerce*, *supra* note 159, at 387.

164. Scott, *supra* note 161, at 309–10.

165. See *The Alwaki and others* [1940] P. 215 at 218 *per* Sir Boyd Merriman, P (“There was the clearest possible evidence of German Decrees which imposed Government control on all these articles and prescribed that they were automatically seized at the moment of coming into the customs house.” (relying on *The Hakan* [1918] AC 418)).

166. See Brown, *supra* note 158, at 859.

167. *Belligerent Interference with Neutral Commerce*, *supra* note 159, at 386–87.



Manual take the same position.<sup>168</sup> The German Commander's Handbook states that the distinction is no longer relevant, but observes that in all cases there must be sufficient evidence to show that the goods are ultimately destined for the military.<sup>169</sup> Only NWP 1-14M continues to draw the distinction, but even it acknowledges its collapse during the Second World War.<sup>170</sup> The Chinese Manual is silent on the issue.<sup>171</sup>

How should prize courts and admiralty practitioners deal with this merger? First, courts must be careful only to condemn items which appear on States' reasonably specific contraband lists. Second, of those items listed, some will be undeniably useful in prosecuting the conflict. Examples include weaponry, ammunition and other military hardware. Little additional evidence will be required for the court to conclude that such items are destined for the military. However, in the case of dual-use items, such as fuel or foodstuffs, the prize court should require clear evidence (which at least satisfies a balance of probabilities evidentiary burden) that they are destined for military or governmental use before they may be condemned. Further, it must be clear that the actual goods seized are destined for military use; proof that their import will free up other resources commercially available for military use is insufficient. Although sanctioned in the English Prize Court during the world wars, such reasoning was never relied on exclusively to justify a condemnation in prize. Based on an Order-in-Council dated July 7, 1916, the approach was characterized as a reprisal measure. That an import frees up commercially available resources has not been employed as a basis for condemnation by a belligerent in any subsequent conflict and should not be considered part of the contemporary law.

While belligerent States enjoy a broad discretion as to which items to include in their contraband lists, international law does recognize that certain items, or free goods, should never be included as contraband.<sup>172</sup> More recently, the San Remo Manual sought to specify a minimum standard for free goods, including religious objects, articles intended for the treatment of the sick and wounded, civilian bedding, essential foodstuffs and means of shelter, items for prisoners of war and other goods not susceptible for use in armed

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168. SAN REMO MANUAL, *supra* note 26, r. 148; Helsinki Principles, *supra* note 10, princ. 5.2.2–5.2.3. UK MANUAL, *supra* note 22, ¶¶ 13.106–13.111. On the UK MANUAL, see also Haines, *supra* note 131, at 98 n.23.

169. GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 260.

170. NWP 1-14M, *supra* note 23, ¶ 7.4.1.

171. One contemporary commentator maintains there is still a distinction between absolute and conditional contraband, but cites no national manuals or State practice in support of this position. Bothe, *supra* note 18, ¶ 1142.

172. See, e.g., Declaration of London, *supra* note 151, arts. 28–29; Scott, *supra* note 161, at 311–12.

conflict.<sup>173</sup> These categories are taken from analogous provisions in the 1949 Geneva Conventions<sup>174</sup> and the 1977 Additional Protocol I.<sup>175</sup> The UK Manual, NWP 1-14M and the German Commander's Handbook use nearly identical terms.<sup>176</sup>

### 3. Destination

Where items are consigned directly to destinations in enemy territory, determining as a matter of fact that there is the requisite enemy destination is a relatively straightforward endeavour. But neutral traders, whose livelihoods may have been dependent on trade in a particular commodity in time of peace with a now belligerent State, might face ruination when that commodity was declared contraband. One way to reduce the risk of capture and condemnation was to import the commodity via another neutral port. Superficially at least, it would appear that the goods were being shipped between two neutral traders in two neutral States. The doctrine of “continuous voyage” was developed to allow a prize court to look at the cargo’s ultimate—not immediate—destination and condemn it if it was, in fact, destined for the enemy.<sup>177</sup>

The doctrine was first employed in England in *The Jesus* (1756).<sup>178</sup> It has been repeatedly employed subsequently. During the U.S. Civil War, Union prize courts routinely applied it in contraband cases. The U.S. Secretary of State, William Jennings Bryan, would later explain to the U.S. Senate, which was complaining bitterly about British contraband rules in force during the First World War, “[i]t will be recalled, however, that American Courts have established various rules bearing on these matters. The rule of ‘continuous voyage’ has been not only asserted by the American tribunals, but extended by them.”<sup>179</sup>

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173. SAN REMO MANUAL, *supra* note 26, r. 150, ¶ 150.2.

174. *E.g.*, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 55, Aug. 12, 1949, 75 U.N.T.S. 31.

175. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 54, 70, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

176. UK MANUAL, *supra* note 22, ¶ 13.110; NWP 1-14M, *supra* note 23, ¶ 7.4.1.1; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 261. The Chinese Manual is silent on this issue.

177. *See, e.g.*, *The Polly* (1800) 2 C. Rob. 361, 368–69, *per* Sir William Scott.

178. Burrell 165. *See also* O. H. Mootham, *The Doctrine of Continuous Voyage, 1756–1815*, 8 BRITISH YEARBOOK OF INTERNATIONAL LAW 62, 66 (1927).

179. *Reproduced in The Kim and others (Condemnation of cargo)* [1915] P. 215, at 274. Examples of U.S. cases are *Jecker v. Montgomery*, 59 U.S. 110 (1855), and *The Bermuda*, 70 U.S. (3 Wall) 514 (1865).

The doctrine of continuous voyage was recognized in the Declaration of London, although a compromise was struck between those States which observed the doctrine (Great Britain and the United States) and those which did not (the continental European powers).<sup>180</sup> The Declaration applied the doctrine to absolute contraband, but not conditional contraband.<sup>181</sup> The Declaration's provision in this respect was soon abandoned by Great Britain and Germany in the First World War.<sup>182</sup> As the distinction between absolute and conditional contraband has likely also been abandoned, the Declaration's position is no longer tenable, if it ever was. During the Arab-Israeli conflicts, the Egyptian Prize Court relied on the doctrine to find that Genoa was a "principal base for [any] contraband traffic destined for Israel."<sup>183</sup>

The San Remo Manual recognizes the doctrine of continuous voyage by the use of the phrase "ultimately destined" for enemy territory.<sup>184</sup> The UK Manual reflects this position.<sup>185</sup> Continuous voyage is also preserved by NWP 1-14M.<sup>186</sup> The German Commander's Handbook holds that continuous voyage may not apply in blockade, but accepts its applicability in the context of contraband.<sup>187</sup> The Helsinki Principles also apply continuous voyage to contraband, albeit subject to an evidentiary rule that, in cases of doubt as to whether goods are intended for a military destination, the burden of proof in subsequent prize proceedings lies with the captor State.<sup>188</sup> As will be seen, this evidentiary rule does not reflect domestic prize court decisions. Nonetheless, the broader doctrine of continuous voyage undoubtedly reflects contemporary customary law.

The doctrine of continuous voyage depends upon the capturers being able to show—or, perhaps, the neutral carrier's failure to show otherwise—that the goods would proceed from the intervening neutral port to enemy territory. Consequently, if it could be shown that the journey was broken or ended at the neutral port, the doctrine would not apply.

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180. Scott, *supra* note 161, at 316.

181. Declaration of London, *supra* note 151, art. 35.

182. *The Louisiana and Other Ships* [1918] AC 461, 470, *per* Lord Parker of Waddington.

183. *The Flying Trader*, 17 INTERNATIONAL LAW REPORTS 440, 442 (Prize Ct. of Alexandria 1956) (Egypt). *See also* George K. Walker, *State Practice Following World War Two: 1945–1990*, in *THE LAW OF NAVAL WARFARE: TARGETING ENEMY MERCHANT SHIPPING* 120, 123 (Richard J. Grunawalt ed., 1993) (Vol. 65, U.S. Naval War College International Law Studies).

184. SAN REMO MANUAL, *supra* note 26, r. 148, ¶ 148.4.

185. UK MANUAL, *supra* note 22, ¶ 13.106–9; Haines, *supra* note 131, at 98, 106–7.

186. NWP 1-14M, *supra* note 23, ¶ 7.4.1.2.

187. GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶¶ 261, 301.

188. Helsinki Principles, *supra* note 10, princ. 5.2.3-4, cmt. at 510–11.

The existence of a break is a question of fact in each case. In Britain, Sir William Grant considered that the goods’ “importation into the common stock of the country” was required,<sup>189</sup> reasoning later adopted by the chief justice of the U.S. Supreme Court in *The Bermuda*.<sup>190</sup> Unloading and reloading was insufficient, as was unloading and reloading into a different ship for onward shipment. Sale to another party was sufficient only where it was evidence of *bona fide* importation. Only clear evidence of the landing of the goods and payment of import duties was enough to satisfy the high evidentiary threshold.<sup>191</sup>

During the First and Second World War, other evidentiary and procedural devices employed by prize courts made it easier for capturing States to prove items were headed for an enemy destination. For example, the “rationing” doctrine introduced in the English Prize Court allowed the court to presume that if a neutral power which neighboured the enemy imported goods in excess of its normal peacetime supply, the excess was going to the enemy.<sup>192</sup> While dicta indicated the English court regarded rationing as grounds in law to condemn cargo as prize, there was a marked reluctance to rely on it alone as grounds for confiscation.<sup>193</sup> Another device was shifting the burden of proof on the destination issue completely to the neutral trader. The English Prize Court in the First World War adopted this approach, on the ground that: “The State of the captors is necessarily unable to investigate the relations between the neutral trader and his correspondents in enemy or neutral countries, but the neutral trader is or ought to be in a position to explain doubtful points.”<sup>194</sup>

First World War prize courts were also prepared to read the phrase “fortified place” widely to ensure as many dual-use goods as possible could be defined as conditional contraband. Under the Declaration of London, goods identified as conditional contraband

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189. *The William* (1806) 5 C. Rob. 385.

190. *The Bermuda*, *supra* note 179.

191. *The Immanuel* (1799) 2 C. Rob. 186, 203, *per* Sir William Scott; *The Kronprinsessan Margareta* [1921] 1 AC 486, 494, 499 (Privy Council). *See generally* Mootham, *supra* note 178, at 74–79; Scott, *supra* note 161, at 314–15.

192. Fitzmaurice, *supra* note 145, at 89–95; TUCKER, *supra* note 46, at 275 n.25; Brown, *supra* note 158, at 854.

193. *The Baron Stjernblad* [1917] AC 173, 177; *The Kim*, *supra* note 179, at 223–24, 232; Fitzmaurice, *supra* note 145, at 89–93.

194. *The Louisiana*, *supra* note 182, at 465. During the Russo-Japanese War, the Russian Supreme Prize Court similarly declared that the onus of proving innocence lay with the neutral carrier and that this was the “generally accepted practice by Prize Courts of all countries.” *The Arabia*, July 20, 1904, *reported in* 1 CECIL J. B. HURST & FRANCIS E. BRAY, RUSSIAN AND JAPANESE PRIZE CASES 42 (1912) [hereinafter “HURST & BRAY VOL. I”].

could be confiscated if they were bound for a fortified place belonging to the enemy.<sup>195</sup> The German government identified all major ports in the British Isles as “fortified places” in 1915.<sup>196</sup> The English Prize Court adopted a similar approach for German ports in the same year.<sup>197</sup> Another British First World War evidentiary presumption held that enemy destination was presumed to exist if goods were consigned to a person in a neutral State who had previously forwarded goods to the enemy.<sup>198</sup> During the Second World War, the English Prize Court also presumed that, in a totalitarian State such as Italy or Germany, the government would requisition and dispose of all goods in a manner which would best support the war effort.<sup>199</sup>

The 1798 case of *The Ringende Jacob* demonstrates how the evidentiary approach of the English court in the twentieth century had changed since the Napoleonic Wars. In respect of a cargo of unwrought iron, destined for the French naval base port of Brest, Sir William Scott said, “as this cargo is going to a port of naval equipment, it would very probably be applied as a naval store; but it may be too much to decide merely on this inference, that it is an article absolutely hostile.”<sup>200</sup> He sought the opinion of an inspecting officer of the king’s yards as to whether the iron should be considered a naval store or not. This apparent restraint is in remarkable contrast with the evidentiary presumptions his successors made during the First and Second World Wars.

Taken together, the evidentiary rules employed in the world wars had the effect that virtually all goods destined to the enemy, and a great many goods destined for neighbouring neutral States, could be confiscated as contraband. To describe contraband as an exception to “free ship, free goods” in these circumstances seems absurd—the exception had become the rule. Evidentiary rules of prize courts are a domestic law issue, and would not expect to be found in national military law of armed conflict manuals. In a common law country such as the UK, the cases cited nonetheless remain good law. If, in a future conflict, contraband controls were imposed and prize courts employed, it seems

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195. Declaration of London, *supra* note 151, art. 34, and *supra* p. 37.

196. TUCKER, *supra* note 46, at 269 n.10.

197. *The Kim*, *supra* note 179, at 271–72. The British government formally abandoned the distinction between destinations required of absolute and conditional contraband in April 1916. TUCKER, *supra* note 46, at 269 n.10.

198. British Maritime Rights Order-in-Council (July 7, 1916).

199. *The Alwaki and Others*, *supra* note 165; *The Monte Contes* [1944] AC 6, 13 (Privy Council) *per* Lord Wright.

200. *The Ringende Jacob*, *supra* note 154.

likely that these evidentiary devices could be employed again, to the detriment of neutral traders.

#### 4. Penalty for Contraband Carriage

Having identified items as contraband, prize courts have imposed various penalties on neutral contraband carriers. These have included confiscation of the contraband items, confiscation of the remaining non-contraband cargo and confiscation of the vessel. It stands to reason that in all circumstances the contraband items will be confiscated to avoid the possibility of their reaching their intended enemy destination. The other penalties are of interest, however, because they might prove more costly to the neutral carrier than the mere confiscation of the contraband items. An assessment of each of them follows.

Caution is required, however. Except for modern developments in arms trade regulation, considered below, international law does not forbid private citizens carrying contraband items.<sup>201</sup> Even if neutral States were obliged to prevent their citizens carrying contraband, the remedy for a breach of that obligation would lay between the aggrieved belligerent and the errant neutral State, not the private neutral carrier. The penalties imposed by prize courts on neutral traders found to be carrying contraband must, therefore, be viewed as a matter of domestic law. Nonetheless, English Prize Court judges have often ruled that they were applying international law. In *The Maria* (1799), Sir William Scott said,

The seat of judicial authority is, indeed, here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting in Stockholm.<sup>202</sup>

The present author's view is that a prize court applies domestic law, but domestic law which should accord with the relevant principles of international law. The decisions themselves are plainly not automatically declaratory of international law.

Confiscation of the remaining innocent cargo first occurred in France. France introduced a policy of "infection" in 1778, decreeing that where three-quarters of the value

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201. Hague XIII, *supra* note 7, art. 7.

202. 1 C. Rob. 340, 350.

of a vessel's cargo was contraband, it was entitled to confiscate the rest as well.<sup>203</sup> The English Prize Court later also confiscated innocent cargo on the basis that contraband had infected it. It did so in *The Staat Emden* (1798),<sup>204</sup> but only in respect of innocent items in the same ownership as the contraband. In *The Kronprinsessan Margareta and other ships*,<sup>205</sup> the UK Privy Council found that the basis of the rule was not punishment. Rather, it was to deter shippers from trading in contraband:

[F]ew modes of deterring contraband trade are more effectual than to establish a rule, known by and applicable to all, that the inclusion by a shipper among his other shipments by the same vessel of one parcel having in fact an ulterior enemy destination may lead to the condemnation of the whole.<sup>206</sup>

On the English approach, the contraband cargo had to account for “a substantial proportion of the goods” before the remaining cargo could be confiscated.<sup>207</sup>

The Declaration of London did not contain any threshold requirement, although the principle of infection was recognized without great dissent among the delegates at the London Conference.<sup>208</sup> Although Great Britain relied on it during the First World War, it was not often employed in the English Prize Court in the Second World War. This is because longer, more comprehensive contraband lists had reduced the need for the Crown to rely on it in justifying confiscation applications—not because the UK no longer viewed infection as reflective of the law.<sup>209</sup>

Infection was not relied upon in reported cases from the Egyptian Prize Court in the Arab-Israel conflict, nor by India or Pakistan in 1965 and 1971. In these more limited conflicts, it might have been that the factual circumstances which could have invoked the doctrine of infection simply did not arise. The principle is not explicitly recognized in any of the modern military manuals surveyed, but it would not need to be. To the naval operator to whom such manuals are addressed, the principal concern is whether he has

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203. NEFF, *supra* note 9, at 65.

204. 1 C. Rob. 26.

205. *The Kronprinsessan Margareta and other ships*, *supra* note 191.

206. *Id.* at 496 *per* Lord Sumner.

207. *The Kim*, *supra* note 179, at 286, *per* Sir Samuel Evans, P.

208. Declaration of London, *supra* note 151, art. 42.

209. S. W. D. Rowson, *Prize Law During the Second World War*, 24 BRITISH YEARBOOK OF INTERNATIONAL LAW 160, 195 (1947). Only three Second World War cases relied on the doctrine. *The Grootekerk* (1941) Lloyd's List 21 Mar.; *The Hakoziaki Maru* (1943) Lloyd's List 14 May; *Various Remittance ex Mails* (1945) Lloyd's List 14 June & 27 July.

grounds to capture, not how the cargo will be disposed after subsequent judicial proceedings. The relative absence of State practice since the First World War should not lead to the conclusion that States have abandoned the infection doctrine. The policy reason behind it remains valid and could lead to its invocation again.

As to confiscation of the vessel, the 1909 Declaration of London provided that where at least 50 per cent of a vessel's cargo was contraband by value, weight, volume or freight, then the vessel might also be condemned as good prize.<sup>210</sup> The Declaration's commentary observed that the condemnation of the vessel would be justified where the "carriage of contraband formed an important part of her venture."<sup>211</sup> The UK and U.S. governments were prepared to compromise in 1909 and allow the Declaration to reflect the European approach, which was based upon percentage of cargo, rather than the *mala fides* of the neutral master, which was the basis of the Anglo-American approach.<sup>212</sup> The French Prize Court had required 75 per cent of the cargo to be contraband before the vessel could be condemned. On the other hand, the decision in the 1799 *Jonge Margaretha* case<sup>213</sup> was an early example of the Anglo-American approach. Sir William Scott declined to confiscate the vessel in addition to the cargo, because "the party has acted without dissimulation in the case and may have been misled by an inattention to circumstances to which in strictness he ought to have adverted."<sup>214</sup>

Following Great Britain's abandonment of the Declaration of London, the English court remained loyal to its forbears. In *The Kim and others (Condemnation of ships)* [1920], Sir Henry Duke relied on the vessel owner's knowledge of contraband carriage to justify condemnation of the vessels in question, without reference to the percentage of cargo.<sup>215</sup> The Japanese Higher Prize Court also adopted this reasoning in *The M.S. Dollar* and *The Wyefield* cases during the Russo-Japanese War of 1904–5.<sup>216</sup> However, in each of these cases the court found that the contraband items had formed a substantial proportion of the goods, so the judgment would have been the same on either approach. Relevant State

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210. Declaration of London, *supra* note 151, art. 40.

211. Scott, *supra* note 161, at 326–27.

212. *Id.*

213. 1 C. Rob. 187.

214. *Id.* at 196.

215. P. 319, at 331.

216. 2 CECIL J. B. HURST & FRANCIS E. BRAY, RUSSIAN AND JAPANESE PRIZE CASES 284, 291 (1912) [hereinafter HURST & BRAY VOL. II].



practice is somewhat old, but indicates there is no rule of international law favouring one approach over the other.

## 5. Future Development

### *a. Navigation Certificates*

By a navigation certificate, commonly abbreviated to “navicert,” a neutral ship subjected itself to inspection by belligerent authorities prior to sailing from a neutral port. It would receive certification that it was not carrying contraband and thus be guaranteed freedom from interference from the certifying belligerent State. Navicerts were most fully developed by Great Britain during the world wars.<sup>217</sup> A similar system to Britain’s was adopted in some detail in the 1939 Harvard Draft Convention.<sup>218</sup> The Harvard system was primarily designed to safeguard inter-neutral trade, and was only applicable to neutral-belligerent trade where there had been specific agreement between the neutral power and the belligerents.

The British system began as voluntary for neutral shippers. For the shipper, the benefit was being safeguarded from interference en route from at least one belligerent. For Britain, it reduced the necessity for naval vessels to conduct visit and search operations, allowing them to be re-tasked elsewhere. However, the United States objected that neutral compliance with the navicert regime might breach neutrality in two ways. The first was that the neutral power that allowed the inspections to take place in its territory permitted its neutrality to be violated; the second was that the neutral vessel which became so certified was engaging in unneutral service.<sup>219</sup> Nonetheless, Great Britain expanded the scheme by an Order-in-Council of July 31, 1940, which declared that any vessel not carrying a navicert was liable to capture and condemnation as a prize on this ground alone.<sup>220</sup> This effectively made navicerts compulsory for neutral traders hoping to avoid interference from British warships.

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217. The system was a reprisal measure justified under an Order-in-Council dated February 16, 1917.

218. Harvard Draft Convention with Commentary, *supra* note 30, arts. 41–43, 48, cmt. at 505–17. Previous historical precedents for the issue of certificates of neutrality are found in *id.* at 507 and the British system in the First World War is described in detail at 508–9.

219. TUCKER, *supra* note 46, at 282.

220. Fitzmaurice, *supra* note 145, at 83–89.

Modern military manuals do not consider the exercise of a navicert system as a violation of neutral territory nor a species of unneutral service on the part of compliant vessels. NWP 1-14M and the German Commander's Handbook expressly adopt this position.<sup>221</sup> The Helsinki Principles address the practice in similar terms.<sup>222</sup> The San Remo, UK and Chinese manuals do not specifically address the issue. None of the sources go so far as to say that absence of a navicert is a sufficient ground in itself for capture, but equally none asserts that it cannot be.

It is likely that the navicert system will retain its place in contemporary law, although the method of its implementation may change. Surface navies have shrunk drastically since the Second World War. In any future conflict, States will likely not have the capacity or desire to employ their warships and auxiliaries in the conduct of visit and search operations. Even the Second World War navicert system is reasonably resource-intensive. It requires the forward deployment of civilian inspectors to key neutral ports. It seems likely that, in the future, the navicert system will develop so that it can be performed using electronic means, perhaps by uploading bills of lading to a database for inspection remotely. A spot-checking system might be needed as back up and enforcement. Heintschel von Heinegg has also made this observation and suggested further that neutral States' own export controls may render the need for belligerent contraband controls of any form obsolete in future.<sup>223</sup>

A side effect of the navicert system is its impact on the business of prize courts. The universal adoption by Great Britain of compulsory navicerts in the Second World War was partly responsible for the enormous reduction in the number of cases before the English Prize Court when compared to the First World War.<sup>224</sup> The reason for this is simple: certifying ships before they sail eliminates the need to visit, search and subsequently capture them and bring them into port for prize adjudication. The regime prevented many

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221. NWP 1-14M, *supra* note 23, ¶ 7.4.2; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 263.

222. Helsinki Principles, *supra* note 10, princ. 5.2.6., cmt. at 511.

223. Wolff Heintschel von Heinegg, *Visit, Search, Diversion, and Capture in Naval Warfare: Part II, Developments since 1945*, 30 CANADIAN YEARBOOK OF INTERNATIONAL LAW 89, 89–90, 133–34 (1992) [hereinafter Heintschel von Heinegg, *Visit, Search, Diversion, and Capture: Part II*].

224. Fitzmaurice, *supra* note 145, at 74. He also sets out other factors which reduced the number of prize cases in the English court in the Second World War in comparison to the First. These were that the precedent established in prize cases in 1914–18 reduced the need for litigation, during the Second World War there were fewer neutral countries bordering Germany than in the First, the declared Allied operational zones in the Atlantic and the Mediterranean meant that many vessels which would otherwise be taken as prize were instead sunk, and the Allied practice of diverting vessels to a home port for visit and search.

who might be tempted to carry contraband from doing so, because they would not be able to obtain a certificate and, as an uncertified vessel, they were virtually certain to be stopped and captured. Even when uncertified vessels were captured, once it had been determined that the absence of a certificate was sufficient grounds in itself for capture and condemnation, there was little to be argued or achieved by the neutral trader in contesting prize litigation. The UK Manual asserts in a footnote that the UK is unlikely to employ the prize court in future; it has been roundly criticized for so doing.<sup>225</sup> However, it is certainly true in the context of contraband enforcement that a navicert regime renders the future use of prize courts highly unlikely.

*b. The Commercial Adventure Doctrine*

Hague XIII, Article 6, provides that neutral States are forbidden to supply “warships, ammunition, or war material of any kind whatever” to belligerent States.<sup>226</sup> Conversely, neutral States are under no duty to prevent their citizens or subjects from supplying war material to belligerents. This principle is enshrined in Hague V and XIII at common Article 7: “A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet.” This is the commercial adventure doctrine. It was affirmed as recently as 2009 by the drafters of the Air and Missile Warfare Manual, which provides: “A Neutral is not bound to prevent the private export or transit on behalf of a Belligerent Party of aircraft, parts of aircraft, or material, supplies or munitions for aircraft.”<sup>227</sup>

While the commercial adventure doctrine allows neutral traders to trade in contraband, they do so at their own risk. The risk of belligerent interception and confiscation is carried by the neutral trader. This point was made clear by the UK Privy Council in *The Louisiana*: “according to international law, neutrals may during a war trade freely as well with belligerents as with other neutrals. If, however, the goods in which they trade are in their

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225. UK MANUAL, *supra* note 22, ¶ 13.89 n.103. For criticism, see YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 248 (2010). In response to this criticism, one of the authors of the Maritime Warfare chapter of the UK Manual has corrected the position, saying that the High Court retains a prize jurisdiction which would still be exercised if required. Haines, *supra* note 131, at 107.

226. Hague XIII, *supra* note 7, art. 6. *See also* Convention on Maritime Neutrality, *supra* note 116, art. 15.

227. AMW MANUAL, *supra* note 3, r. 173. *See also* Hague Rules of Aerial Warfare art. 45, Feb. 19, 1923, *reprinted in* 32 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 12 (1938) (not in force).

nature contraband, the traffic includes certain risks.” Their Lordships described the neutral trader’s position before the Prize Court as “not in the position of a person charged with a criminal offence. . . . He comes before the Prize Court to show that there was no reasonable suspicion justifying the seizure or to displace such reasonable suspicion as in fact exists.”<sup>228</sup>

This traditional understanding of the doctrine may now be in doubt, particularly in relation to the arms trade.<sup>229</sup> As early as 1939, the commentary to the Harvard Draft Convention expressed the view that the law might be developing in favour of a duty on neutral States to prohibit private arms exports, and supported that development.<sup>230</sup> The Draft Convention stopped short of including such a prohibition, merely providing that neutral States were permitted to control or prohibit the export or transit through its territory of arms or other war supplies to belligerents.<sup>231</sup> The commentary gives examples of State practice in voluntary controls on arms exports dating back to the eighteenth century.<sup>232</sup>

Some argue that, while the law may long have recognized such voluntary controls, the nature of the modern arms trade might now mean that *any* sale of arms from a neutral to a belligerent State is unlawful.<sup>233</sup> They argue that virtually all international arms sales now require some exercise of government power or control. This might be because the State has a significant ownership share in an outwardly private arms company, or because States choose to impose monopolistic controls on all arms sales. In either circumstance, a sale of arms or ammunition by a neutral private trader to a belligerent power is likely to necessitate direct involvement and supervision of the public power, and constitute a breach of that State’s duties under Hague XIII, Article 6.<sup>234</sup> However, State practice on the control of arms sales to belligerents since the Second World War is inconsistent, and can only support the view that neutral States are permitted, rather than obliged, to enact controls on arms

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228. *The Louisiana*, *supra* note 182, 464–65. For a similar view expressed in the U.S. Supreme Court, see *Northern Pacific Railway Company v. The American Trading Company*, 195 U.S. 439 (1904). This case is discussed in Scott, *supra* note 161, at 325.

229. This point was recognized in the AMW MANUAL, *supra* note 3, cmt. 3 to r. 173 at 319.

230. Harvard Draft Convention with Commentary, *supra* note 30, cmt. at 282–313 (in particular at 299).

231. *Id.*, art. 11.

232. *Id.*, cmt. at 283–99.

233. GEORGE P. POLITAKIS, MODERN ASPECTS OF THE LAWS OF NAVAL WARFARE AND MARITIME NEUTRALITY 419 (1998); Bothe, *supra* note 18, ¶ 1112; NEFF, *supra* note 9, at 200–203.

234. POLITAKIS, *supra* note 233, at 419.

sales during armed conflicts.<sup>235</sup> Nonetheless, States which have domestic arms control laws obviously remain bound to apply them during an armed conflict. Growing support for the Arms Trade Treaty, which would place tighter controls on the international arms trade even in peacetime, might eventually spell the end of the commercial adventure doctrine as far as arms and ammunition are concerned.<sup>236</sup>

## 6. Contraband: Closing Remarks

Modern military manuals continue to reflect the traditional law of contraband, indicating a marked desire among States to preserve their belligerent rights. While States are carefully preserving their positions in case of future need, even in conflicts where interference with the enemy's trade is justified the future exercise of contraband control is likely to be fundamentally different to that prior to 1945. The reduction in the number of naval platforms operated by most States will drive a desire to rely less on traditional visit and search, and more upon cargo pre-inspection and spot-checks, possibly conducted electronically. The Tallinn Manual contemplates that naval blockades might be enforced by cyber means—there is no reason in principle why the same should not be true of contraband measures.<sup>237</sup>

States might be unwilling to engage in confiscation as prize of captured cargo and material which they cannot readily convert to their own use. Prize proceedings require, in addition to the convening of a prize court and the retention of admiralty practitioners, warehouse storage facilities; berthing space for captured vessels; administrative infrastructure, including value assessors; and even accommodation for captured crews. This administrative effort might be disproportionately onerous to the military benefit gained. Weighed against the practical challenges of administering prize proceedings, the navicert regime discussed above seems particularly attractive. Taken together, these facts will likely contribute to a significant reduction, if not abandonment altogether, of prize court use in the future. For example, during enforcement of the Gaza blockade, the Israeli government

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235. See *id.* at 485–503 for a detailed discussion of State practice in regulating arms sales during the Falklands War and the Iran-Iraq War.

236. See *About the Arms Trade*, UN OFFICE FOR DISARMAMENT AFFAIRS, <http://www.un.org/disarmament/convarms/ArmsTrade/> (last visited Jan. 8, 2014).

237. TALLINN MANUAL, *supra* note 3, r. 67.

did not seek to convert or confiscate captured vessels and cargo. They simply repatriated them as soon as investigative and evidence gathering considerations allowed.<sup>238</sup>

Lastly, the law of contraband demonstrates interesting shifts in the positions taken by both the U.S. and the UK over the course of the twentieth century. The U.S., so often a defender of the rights of the neutral prior to the Second World War, now adopts the most heavily pro-belligerent position.<sup>239</sup> This trend will be demonstrated in other areas of the law. Meanwhile, the UK's retreat from a fiercely pro-belligerent stance, demonstrated by positions taken at the Hague conferences, the London Conference and in both world wars, is evidenced in its Manual which takes a more measured position, choosing to adopt (verbatim in many respects) the text of the San Remo Manual.

B. *The Rule of 1756 (Engaging in a Forbidden Trade)*

The Rule of 1756 is the usual name for the rule forbidding a neutral trader from availing himself of a line of trade with a belligerent in wartime which is unknown to him in peacetime. It actually significantly predates 1756 and traditionally referred to trade between a colony and the belligerent colonial power.<sup>240</sup> Almost without exception, colonial powers exercised strict monopolies over the trade of their colonies in order to maximize their own economic returns. However, in the 1756 war between France and England, France granted to neutral Dutch vessels the right to carry goods from French colonies to France.<sup>241</sup> This was an attempt to place those goods beyond capture by England.

Prior to the universal recognition of the “free ships, free goods” principle in the 1856 Declaration of Paris, England had entered into a 1674 treaty with the Netherlands which provided that, in the event of war between England and any other country, goods belonging to England's enemy in Dutch ships would remain free from seizure.<sup>242</sup> The English Prize Court nonetheless found that Dutch ships carrying French colonial trade

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238. *See infra* pp. 69-73.

239. For example, the U.S. assertion that lists of free goods satisfies the requirement of reasonably specific contraband lists.

240. Marsden, *Early Prize Law: Part II*, *supra* note 135, at 244.

241. NEFF, *supra* note 9, at 65.

242. Treaty of Navigation and Commerce art. 8, Eng.-Neth., Dec. 10, 1674, *reprinted in* 13 CONSOLIDATED T.S. 1673-1675, at 255 (Clive R. Parry ed., 1969). The Treaty is discussed in NEFF, *supra* note 9, at 65.

were exempt from England's treaty obligation to the Netherlands.<sup>243</sup> Sir William Scott later explained the rule in *The Immanuel* (1799):

[T]he general rule is, that the neutral has a right to carry on in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds no title of use and habit in time of peace. . . .<sup>244</sup>

The basis of the Rule of 1756 was that the neutral was rendering service to a belligerent inconsistent with the neutral duty of impartiality. In essence, the neutral vessel was trading for the enemy belligerent, rather than with him.<sup>245</sup> The penalty for infraction of the Rule was accordingly severe—forfeiture of not only the offending cargo, but also the vessel.<sup>246</sup> However, the English Prize Court treated that penalty as discretionary and, in at least two cases, chose in the circumstances only to condemn the cargo.<sup>247</sup>

Whether the rule was ever reflective of customary law is a matter of doubt. Sir William Scott, in a later case, ruled that French State practice indicated that the French government recognized the rule as one of international law.<sup>248</sup> A version of the rule was enforced by the Japanese Prize Court during the Russo-Japanese War. In *The Montara*, decided in 1906, the Japanese Higher Prize Court expressly relied on it to sanction capture of a neutral vessel engaged in small coastal trade in Russia, trade which was normally open only to Russians. The Japanese court ruled that the Rule of 1756 remained a rule of international law.<sup>249</sup>

The Rule of 1756 was not addressed at all by the Hague XIII delegates. The British government also specifically excluded it from the scope of the 1909 Declaration of London, indicating perhaps a desire that the rule be unmolested.<sup>250</sup> The 1939 commentary to the Harvard Draft Convention opined that breach of the “famous” Rule of 1756 might constitute unneutral service and justify capture, but nothing more than that was said and

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243. Mootham, *supra* note 178, at 64.

244. 2 C Rob. 186, 198.

245. *Id.* at 195; NEFF, *supra* note 9, at 66.

246. *The Minerva* (1801) 3 C Rob. 229, 232 *per* Sir William Scott.

247. *Id.* at 232; *The Immanuel*, *supra* note 191, at 205–6.

248. *The Wilhelmina* 4 C Rob. App 4; Scott, *supra* note 161, at 539.

249. *The Montara* (1906), HURST & BRAY VOL. II, *supra* note 216, at 403. Contrarily, in *The Thea* (1904), the Russian Supreme Prize Court said in reference to engagement in Japanese coastal trade “the *Thea* was engaged in a perfectly peaceful occupation.” HURST & BRAY VOL. I, *supra* note 194, at 96.

250. Scott, *supra* note 161, at 540.

no substantive provision was included in the Draft Convention.<sup>251</sup> The present author has not found a prize case since *The Montara* which relies on the rule as a ground for capture or condemnation. It is not reflected in any of the modern military manuals surveyed. The rule's origin in the context of colonial trade heavily suggests that it has fallen into desuetude. However, it had lain practically dormant for over one hundred years before being employed in Japan in 1906. This reliance placed upon it by the Japanese government in a wholly novel context allows for a very remote possibility that the rule could be invoked in some new way by States in future conflicts.

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251. Harvard Draft Convention with Commentary, *supra* note 30, cmt. at 658–59.



## PART FOUR: BELLIGERENT CONTROL OF THE SEA

Part Three examined belligerent States' authority to place controls on their enemy's trade, including where this trade is carried out by neutral vessels. This Part examines the circumstances in which belligerent States may place controls over areas of the sea, even to the detriment of neutral shipping. The legal concepts of blockade, maritime zones and control of shipping in the immediate vicinity of naval operations are examined. Blockade is a device allowing belligerent States to control access to and egress from an area of enemy coast. Maritime zones, a relatively new and still controversial concept, may allow belligerents to establish controls, including the exclusion of neutral shipping, over operationally significant sea areas. They might be static geographically defined zones, or they might be mobile zones around a moving belligerent warship or other unit. Finally, the law has long accepted that belligerents may place controls on all shipping in the immediate vicinity of their naval operations. These three concepts are designed to allow the belligerent to have an effect on its enemy, but each has the ability significantly to interfere with neutral ships exercising their freedoms of trade and navigation.

### A. *Blockade*

In 1997, Captain Humphrey, then Chief Naval Judge Advocate of the UK Royal Navy, wrote:

The experiences and practices in the two world wars left the law of blockade devoid of most of its traditional characteristics and made its applicability and content post 1945 questionable. The practical effect may be that formal blockade in the sense of close visible investment has become obsolete and resort has to be had to other methods such as mine-laying and institution of war zones.<sup>252</sup>

Nonetheless, in recent years classic blockade has been twice employed by Israel—in 2006 in Lebanon and in 2009 in Gaza.<sup>253</sup> There was broad agreement that the legal regime which

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252. D. R. Humphrey, *Belligerent Interdiction of Neutral Shipping in International Armed Conflict*, 2 JOURNAL OF CONFLICT & SECURITY LAW 23, 27 (1997).

253. Russian controls on Georgian trade at sea during the 2008 conflict were described as a “blockade” in some news sources. See, e.g., *Russian Navy Blockade [sic] Georgia*, CHINA VIEW (Aug. 10, 2008), [http://news.xinhuanet.com/english/2008-08/10/content\\_9138604.htm#prof](http://news.xinhuanet.com/english/2008-08/10/content_9138604.htm#prof). The 2009 Independent

governed those blockades was the traditional law of naval warfare and maritime neutrality.<sup>254</sup> This Part will first assess the legal requirements for a blockade. It will then address whether they are suitably robust to accommodate modern weapon systems and platforms before considering the Gaza blockade as a case study.

Blockade is the blocking of the approach to the enemy coast or ports for the purpose of preventing the ingress and egress of ships and aircraft of all States.<sup>255</sup> It has been described as

a sort of circumvallation around a place, by which all foreign connexion [sic] and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than importation.<sup>256</sup>

To be lawful, a blockade must comply with five requirements: notification, effectiveness, impartiality, proportionality and the preservation of access to neutral coasts.

## 1. Notification

With the exception of the Chinese Manual, which does not deal with the criteria for a lawful blockade, the manuals surveyed uniformly state that all aspects of a blockade must be formally notified.<sup>257</sup> Under the traditional law, the mode of notification depended upon the manner in which the blockade was established. A blockade established by a government was obliged to be formally notified to other governments. Prior to the advent of instant global communications, the law also allowed a blockade to be established de

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International Fact-Finding Mission on the Conflict in Georgia instead described Russian Black Sea Fleet activity as enforcement of a “maritime security zone.” FACT-FINDING REPORT, *supra* note 144, at 212.

254. 1 Jacob Turkel et al., The Public Commission to Examine the Maritime Incident of 31 May 2010 (2011), *available at* [http://turkel-committee.gov.il/files/wordocs//87072\\_00211english.pdf](http://turkel-committee.gov.il/files/wordocs//87072_00211english.pdf) [hereinafter Turkel Commission]; Turkish National Commission of Inquiry, Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010 (2011), *available at* <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf>. [hereinafter Turkish Report]; U.N. Secretary-General’s Panel of Inquiry, *Report on the 31 May 2010 Flotilla Incident* (Sept. 2011), *available at* [http://www.un.org/News/dh/infocus/middle\\_east/Gaza\\_Flotilla\\_Panel\\_Report.pdf](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf) [hereinafter Palmer Report]. All relied upon the traditional law of blockade in their analyses of the Gaza blockade.

255. NWP 1-14M, *supra* note 23, ¶ 7.7.1; SAN REMO MANUAL, *supra* note 26, at 176.

256. The *Vrouw Judith* (1799) 1 C. Rob. 150, 151–52, *per* Sir William Scott.

257. SAN REMO MANUAL, *supra* note 26, r. 93–94; Helsinki Principles, *supra* note 10, princ. 5.2.10; UK MANUAL, *supra* note 22, ¶ 13.65; NWP 1-14M, *supra* note 23, ¶ 7.7.2.2; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 292. The AMW MANUAL, *supra* note 3, r. 148, endorses an identical rule for aerial blockades.

facto by a naval commander on the scene, provided he had prior authorization to do so from his government. Such blockades required specific notification to every vessel approaching the blockaded coast.<sup>258</sup>

Before a merchant vessel may be held to have breached a blockade, the blockading State must be able to prove the vessel knew or ought to have known of the blockade's existence. The traditional law was unclear as to what evidence was sufficient to prove knowledge. The Anglo-American approach diverged from the European approach. The former attributed knowledge to vessels flagged to neutral States whose governments had been duly notified so long as there had been sufficient time for the vessels to be informed. The European approach required each potential blockade runner to have been individually notified by the blockading force.<sup>259</sup> *The Ringende Jacob* is an early case demonstrating the Anglo-American approach.<sup>260</sup> The eponymous vessel was caught apparently trying to breach the English blockade of Amsterdam during the 1780–84 Anglo-Dutch War. Sir William Scott sought specific evidence that she had left her port of origin, Riga, after notice of the blockade had reached there. Only then would he impute knowledge of the blockade to the vessel's master.<sup>261</sup> As observed in a prize court decision in the following year, vessels within a blockaded port need not be specifically notified, because "it is impossible for those within to be ignorant of the forcible suspension of their commerce; the notoriety of the thing supersedes the necessity of particular notice to each ship."<sup>262</sup>

Modern military manuals do not prescribe the manner of notification. In the case of the Israeli blockades in 2006 and 2009, notification was achieved by the publication of Notices to Mariners.<sup>263</sup> The AMW Manual states that aerial blockades should be notified by a Notice to Airmen.<sup>264</sup> In light of the lack of objection to the Israeli practice and the position of the AMW Manual, it may be concluded that these are now the most appropriate means to publicize a blockade.

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258. *The Adula*, 176 U.S. 361 (1899).

259. See Charles N. Gregory, *The Law of Blockade*, 12 YALE LAW JOURNAL 339, 342 (1903).

260. *Supra* note 154.

261. *Id.* at 91–92a.

262. *The Vrouw Judith*, *supra* note 256, at 152.

263. See, e.g., Notice to Mariners 1/2009 (Jan.6, 2009), available at <http://asp.mot.gov.il/en/shipping/notice2mariners/547-no12009>.

264. AMW MANUAL, *supra* note 3, r. 148(c), cmt. ¶¶ 1–4 at 289.

## 2. Effectiveness

A blockade must be effective.<sup>265</sup> Effectiveness is a question of fact, determined by the risk of capture faced by vessels attempting to breach the blockade. There must be sufficient danger of capture before the blockade can be considered effective.<sup>266</sup> Dangerousness does not necessitate interception of every blockade runner, but sufficient military resources must be committed to render it probable that vessels and aircraft will be prevented from entering or leaving the blockaded area. The dangerousness requirement has its origins in the protection of neutral rights. Found in Article 4 of the 1856 Declaration of Paris, it is grounded in the neutral desire that belligerent powers not be permitted to declare “paper blockades” without the means or motive to enforce them. In determining dangerousness, the distance of the blockading force from the coast and the nature of the blockading force will be relevant factors.

As to the blockade’s distance from the coast, there are two related but distinct questions. The first is at what distance from the coast may the blockade be declared? The second is, once declared, where might the blockade be enforced? In the blockade paradigm, the blockading State declares a blockade line around an area of enemy coast and places a squadron of warships on or near the blockade line to enforce it. This archetypal blockade was contemplated by the States declaring the First Armed Neutrality in 1780–83, which required that the blockading force be “anchored and sufficiently near” the enemy coast.<sup>267</sup> In the view of these States at the time, only such a close blockade was permissible in law: “The immediate entrance to a port must be guarded by stationary vessels, in such

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265. SAN REMO MANUAL, *supra* note 26, r. 95; Helsinki Principles, *supra* note 10, princ. 5.2.10; UK MANUAL, *supra* note 22, ¶ 13.67; NWP 1-14M, *supra* note 23, ¶ 7.7.2.3; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 292.

266. Wolff Heintschel von Heinegg, *The Law of Armed Conflicts at Sea*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 18, 475, 557 [hereinafter Heintschel von Heinegg, *Armed Conflicts at Sea*]; NWP 1-14M, *supra* note 23, ¶ 7.7.2.3. The dangerousness formulation appears in the judgment of the U.S. Supreme Court in the *Olinde Rodrigues*, 174 U.S. 510, 517 (1899). It was also employed by Dr Lushington, P., in *The Franciska and others*, reported in JAMES P. DEANE, THE LAW OF BLOCKADE AS IN THE REPORT OF EIGHT CASES ARGUED AND DETERMINED IN THE HIGH COURT OF ADMIRALTY ON THE BLOCKADE OF THE COAST OF COURLAND 1854, at 90 (1855). Other manuals simply declare that effectiveness is a question of fact in each case. See SAN REMO MANUAL, *supra* note 26, r. 95, UK MANUAL, *supra* note 22, ¶13.67; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 292.

267. The First Armed Neutrality was an alliance of neutral European States organized to protect their shipping against the Royal Navy’s policy of unlimited interference with neutral shipping destined for France or carrying French contraband. See Gregory, *supra* note 259, at 342.

number as either to render entrance impossible, or at least to expose any ships running in to a cross fire from the guns of two of them.”<sup>268</sup>

On the Anglo-American view, so long as the blockade remained effective, the distance of the blockading force from the coast was irrelevant. This view balances locating the blockading force so close to the coast that it may be at risk from enemy onshore weaponry, and locating it so far away that the blockade may fail for want of effectiveness.<sup>269</sup> In 1854, Riga was blockaded at a distance of one hundred and twenty miles from the coast by a single ship in the Lyser Ort, a narrow channel forming the only navigable entrance to the Gulf of Riga. This blockade was held to be effective by the English Prize Court.<sup>270</sup> The contemporary military manuals surveyed and the San Remo and AMW manuals all adopt the Anglo-American approach. These manuals provide that the distance from the coast that the force maintaining the blockade is located is dependent upon military requirements.<sup>271</sup> International reaction to the Israeli blockades of 2006 and 2009, although sometimes critical of the nature and place of Israeli enforcement action, did not demure from the Anglo-American approach to the distance question.<sup>272</sup>

The looser Anglo-American approach means there is no need for a formal blockade line so long as the blockading force is effective at preventing vessels from entering or leaving the blockaded ports or coast. None of the contemporary military manuals surveyed refer to any requirement for a blockade line. The Harvard Draft Convention posited the creation of a blockade zone as an area of water inside a blockade line in which it was forbidden for merchant vessels to enter. The Convention commentary was clear that this did not reflect contemporary law, but suggested it might be a useful concept for belligerents establishing blockades.<sup>273</sup> Nonetheless, the blockade zone has not been adopted in any of the manuals surveyed. Israel’s blockade of Gaza did include a declared

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268. *Id.* at 343.

269. See NWP 1-14M, *supra* note 23, ¶ 7.7.5; SAN REMO MANUAL, *supra* note 26, ¶ 96.1.

270. See *The Franciska and others*, *supra* note 266, at 93.

271. UK MANUAL, *supra* note 22, ¶ 13.65; NWP 1-14M, *supra* note 23, ¶ 7.7.2.3; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 292; SAN REMO MANUAL, *supra* note 26, r. 96. The AMW MANUAL, *supra* note 3, r. 155, uses analogous terms in respect of aerial blockades.

272. The Turkish Report, *supra* note 254, at 87, criticized Israel’s early enforcement action, but did not claim that the scope of the declared blockade was excessive under the law of naval warfare.

273. Harvard Draft Convention with Commentary, *supra* note 30, arts. 69 & 1(e). The commentary states the right to establish a blockade zone “is not believed to express any existing rule of law . . . but is intended to supplement the means of enforcing a blockade now available to belligerents.” *Id.* at 692–93.

blockade line and a blockade zone behind it, but neither the line nor the zone is an essential requirement of a blockade.

As to where a lawfully established blockade may be enforced, there are two positions: (1) that a blockade may only be enforced in the vicinity of the blockaded area and (2) that a State which has properly established a blockade may enforce it anywhere it likes, so long as it can show that the object vessel intends to breach the blockade.<sup>274</sup> Traditionally, the European approach espoused the more restrictive position, while the Anglo-American approach adopted the intention doctrine.<sup>275</sup> The European approach was adopted in the 1909 Declaration of London after both the UK and U.S. conceded the point in negotiations.<sup>276</sup> The San Remo Manual offered no view on the intention doctrine. NWP 1-14M still expressly embraces it;<sup>277</sup> the UK Manual is silent on the issue. The German Manual states that a vessel may only be captured for breach of blockade if it “has attempted to leave or approach the blockaded area.”<sup>278</sup> While far from explicit, this implies a rejection of the intention doctrine. In the view of the present author, the doctrine is unsustainable in the contemporary law. The Gaza blockade case study will amplify this position.

The traditional law had little to say on the nature of the blockading force. The 1856 Declaration of Paris, Article 4, provides: “Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coasts of the enemy.” Anglo-American prize decisions affirmed that a blockade enforced by a single vessel could be effective if the capabilities of that single ship rendered the blockade effective on the facts.<sup>279</sup>

More recently, there has been some dispute as to whether a blockade may be enforced by a naval minefield alone. In 1972, the United States mined North Vietnamese waters off Haiphong and successfully denied access to and egress from that port for some three hundred days.<sup>280</sup> This action was justified by the U.S. as a measure of self-defence and never referred to as a blockade, although the modern NWP 1-14M states expressly that

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274. TUCKER, *supra* note 46, at 293–4.

275. Gregory, *supra* note 259, at 345.

276. Declaration of London, *supra* note 151, art. 17; NEFF, *supra* note 9, at 139.

277. NWP 1-14M, *supra* note 23, ¶ 7.7.4.

278. GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 301.

279. E.g., *The Olinde Rodrigues* (1899), *supra* note 266, at 517.

280. Humphrey, *supra* note 252, at 31.

blockade by minefield alone is lawful, citing the Haiphong mining in support.<sup>281</sup> The U.S. view might be criticized on the grounds that an unmanned blockade risks unintended harm to, for example, a vessel in distress or one that is ignorant of the blockade.<sup>282</sup> Some commentators have suggested that blockade by minefield alone would be lawful only so long as the blockading State provided sufficient monitoring to prevent unintended harm.<sup>283</sup> A second criticism is that the prescribed penalty for breach of blockade is capture, not destruction or attack (unless capture is resisted), which manifestly cannot be achieved by a minefield.<sup>284</sup> However, a properly notified minefield can be such a strong deterrent that there are no breaches and, therefore, no penalties to be applied.

During the Iran-Iraq War, Iraq enforced a declared maritime exclusion zone by the use of air assets alone.<sup>285</sup> The purpose of the Iraqi zone was blockade-like, although never described as a blockade. It was intended to prevent oil tankers accessing the Iranian oil infrastructure. Iraq's enforcement of the zone was justly criticized on the grounds that it was indiscriminate and excessive; Iraq used fighter aircraft to attack merchant vessels in and approaching the zone.<sup>286</sup> However, there is no reason in principle why a blockade (or a lawful zone) may not be enforced by air assets alone so long as the blockade is effective and enforcement activity is sufficiently discriminate and proportionate.<sup>287</sup>

The Tallinn Manual, Rule 67, states: "Cyber methods and means of warfare may be used to maintain and enforce a naval or aerial blockade provided that they do not, alone or in combination with other methods, result in acts inconsistent with the law of international armed conflict." In the accompanying commentary, the Manual suggests that "[r]emote access cyber operations against propulsion and navigation systems are examples of the sort

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281. NWP 1-14M, *supra* note 23, ¶ 7.7.5.

282. See SAN REMO MANUAL, *supra* note 26, ¶ 97.1; Heintschel von Heinegg, *Armed Conflicts at Sea*, *supra* note 266, at 557.

283. Wolff Heintschel von Heinegg, *Methods and Means of Naval Warfare in Non-International Armed Conflicts*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 211, 222 (Kenneth Watkin & Andrew J. Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies) [hereinafter Heintschel von Heinegg, *Methods and Means*].

284. See, e.g., SAN REMO MANUAL, *supra* note 26, r. 98; UK MANUAL, *supra* note 22, ¶ 13.70; NWP 1-14M, *supra* note 23, ¶ 7.10, GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 301.

285. WALKER, *supra* note 76, at 47–48.

286. William J. Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 CANADIAN YEARBOOK OF INTERNATIONAL LAW 91, 121 (1986).

287. AMW MANUAL, *supra* note 3, cmt. 1–3 at 287 (observes that naval blockades may be enforced by air assets alone and that an aerial blockade might be similarly enforced by naval assets).

of cyber operations that can support naval blockades.”<sup>288</sup> As cyber capabilities develop, this is another example of how a blockade might now lawfully be enforced without any physical presence in the blockaded area. However, the enforcement activity contemplated by the Tallinn Manual—targeting propulsion and navigation systems—could leave the object vessel at risk and might generate a monitoring requirement, akin to the argument in respect of blockade by minefield. This is obviously a developing area of the law and the scope of the rule cannot yet be determined.

### 3. Impartiality

A blockade must be applied impartially, that is, it must be enforced against vessels from all States, whether neutral or belligerent, regardless of the nature of the goods they are carrying. The traditional reason for the impartiality requirement was to ensure that the blockading State could not improperly benefit from the declaration of a blockade by allowing its own merchant vessels to trade to the exclusion of all others. Modern manuals continue to reflect the rule.<sup>289</sup> The Turkish government criticized the Israeli blockade of Gaza for failing uniformly to enforce the blockade.<sup>290</sup> This criticism was misguided, relying as it did upon evidence which pre-dated the Israeli declaration of blockade, but it nonetheless reflects the widespread contemporary view of the continuing validity of the impartiality rule.

Failure to comply with the impartiality rule renders the entire blockade void. Accordingly, the blockading power must lift it. Before the failed blockade is lifted a merchant vessel may not disobey or ignore a notified blockade because it unilaterally considers the blockade unlawful. However, captures on the basis of a failed blockade should be found unlawful during subsequent prize proceedings, and vessels and cargo restored.<sup>291</sup>

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288. TALLINN MANUAL, *supra* note 3, at 200.

289. NWP 1-14M, *supra* note 23, ¶ 7.7.2.4; UK MANUAL, *supra* note 22, ¶ 13.72; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 297; SAN REMO MANUAL, *supra* note 26, r. 100.

290. Turkish Report, *supra* note 254, at 74–75.

291. See *The Franciska and others*, *supra* note 266, at 96 (where Dr Lushington, P., was prepared to restore the prizes if the blockade had not been found “legitimate” for want of effectiveness or impartiality).



It is argued below that there is no rule of law that a maritime zone must be enforced impartially.<sup>292</sup> Indeed, enforcement of a zone only against enemy shipping, as opposed to against all shipping, helps ensure the zone's impact on neutrals is not disproportionate. This logic applies equally to a blockade. The traditional motivation for the impartiality rule lacks contemporary relevance and it would be a favourable development in the law if it were removed from the law of blockade. This would allow the blockading belligerent to focus only on preventing access to, or egress from, the blockaded coast which had an immediate military benefit, while reducing the potential for economic impact upon neutral traders.

#### 4. Proportionality

This dissertation groups the three rules which limit the effect a blockade can have on the civilian population of the blockaded territory under the general heading "proportionality." They are not, strictly, all rules of proportionality, but they are so interrelated that contemporary manuals, as will be seen, often deal with them in the same provision or rule. The three rules are: (1) a blockade may not be intended to starve civilians; (2) a blockade may not inflict suffering which is disproportionate to the military advantage it confers; and (3) a blockade must not prevent supply to the civilian population of items essential to their survival.<sup>293</sup>

The first rule is an outright ban on a blockade that has as its *sole* purpose the starvation of civilians. NWP 1-14M, the German Commander's Handbook and the San Remo Manual state the rule in these terms.<sup>294</sup> The UK Manual says that a blockade will be unlawful if it is "intended to starve" the civilian population.<sup>295</sup> This appears broader than the sole purpose threshold. The AMW Manual also prefers a broader interpretation of the rule, stating that a blockade will be unlawful if it has the "sole or primary" purpose of starving civilians.<sup>296</sup> Sole appears to be a very high threshold such that it might render the starvation rule of

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292. See *infra* pp. 79-80.

293. SAN REMO MANUAL, *supra* note 26, r. 102-3; UK MANUAL, *supra* note 22, ¶¶ 13.74-75; NWP 1-14M, *supra* note 23, ¶ 7.7.2.5; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶¶ 298-300.

294. NWP 1-14M, *supra* note 23, ¶ 7.7.2.5; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 298; SAN REMO MANUAL, *supra* note 26, r. 102(a), ¶¶ 102.1-3.

295. UK MANUAL, *supra* note 22, ¶ 13.74.a.

296. AMW MANUAL, *supra* note 3, r. 157(a). The commentary to rule 157(a) makes clear this is intended to be broader than the NWP 1-14M and San Remo position. *Id.*, cmt. 2 at 296.

very limited practical application. Even where a blockading belligerent is unscrupulous enough to impose a blockade in order to starve civilians, it will likely be possible to attribute some other military advantage to the blockade which might help it evade being in noncompliance of this rule. It is easy to see why the UK and the drafters of the AMW Manual preferred a broader statement of it.

The second rule is a rule of proportionality. A blockade is prohibited if the damage caused to the civil population is excessive compared to the expected military advantage conferred. The military manuals surveyed and the San Remo Manual agree that this rule limits the establishment of blockades just as it does any other military activity.<sup>297</sup> It is clear that the sort of damage contemplated in this rule is starvation or, perhaps more broadly, hunger.<sup>298</sup> This rule is broader than the starvation rule, and includes blockades which incidentally cause starvation or hunger, in addition to those intended to starve civilians. Abolition of the impartiality requirement, recommended above, would also assist blockades remain proportionate. Enforcement activity could then lawfully be focused on vessels whose breach of the blockade has a military effect. The current requirement that a blockade be uniformly enforced renders its impact on the blockaded population necessarily more onerous than it would if the impartiality rule were abolished.

The third rule is that a blockade must not deprive the civilian population of items essential to its survival. It is reflected in all contemporary manuals save for the Chinese Manual, which, as has already been observed, does not deal with the specific criteria for a lawful blockade.<sup>299</sup> Essential items include items involved in the production of foodstuffs and medical supplies, and perhaps heating fuel, depending on the circumstances of the blockaded population. The blockading power retains the right to determine the technical arrangements for how such items are provided to the population of the blockaded territory.<sup>300</sup> The denial does not have to be *intended* by the blockading State for the blockade to be unlawful under this rule. However, when a blockading State makes technical

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297. NWP 1-14M, *supra* note 23, ¶ 5.3.3; UK MANUAL, *supra* note 22, ¶ 13.74.b; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 298; SAN REMO MANUAL, *supra* note 26, r. 102(b). See also AMW MANUAL, *supra* note 3, r. 157(b), for aerial blockades.

298. SAN REMO MANUAL, *supra* note 26, ¶ 102.4; Turkel Commission, *supra* note 254, at 93–95.

299. UK MANUAL, *supra* note 22, ¶ 13.74.a; NWP 1-14M, *supra* note 23, ¶ 7.7.2.5; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 300; SAN REMO MANUAL, *supra* note 26, r. 102(a). See also AMW MANUAL, *supra* note 3, r. 157(a).

300. UK MANUAL, *supra* note 22, ¶¶ 13.74.a, 13.75; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 300; SAN REMO MANUAL, *supra* note 26, r. 102(a), ¶¶ 103–4.

arrangements for the delivery of humanitarian aid to the blockaded territory, merchant vessels carrying it are obliged to abide by those technical arrangements. As a matter of *lex lata*, vessels carrying humanitarian aid have no right simply to sail through the blockade, as they might do if the impartiality rule was abolished. To describe this third rule as a “duty of free passage” binding upon the blockading State is not an accurate assessment of the current law, although it would be a desirable development.<sup>301</sup>

## 5. Preservation of Access to Neutral Coast

All of the manuals surveyed except the Chinese Manual assert that a blockade must not block access to a neutral State’s coastline.<sup>302</sup> The AMW Manual reflects this position, but also explicitly states that an aerial blockade must not bar access to straits used for international navigation or archipelagic sea lanes.<sup>303</sup> The Manual’s commentary claims that the origin for this rule is the law of naval blockade.<sup>304</sup>

What is meant by access? Historically, the term meant physical access by vessels and aircraft. The Tallinn Manual preserves this definition in respect of naval and aerial blockades, whether enforced by cyber or traditional means. Some of the Tallinn drafters accepted the concept of a pure cyber blockade. Those who did considered that access to neutral cyberspace and infrastructure must also be preserved during such a blockade.<sup>305</sup>

## 6. Breach of Blockade

The San Remo Manual and the UK Manual provide that a vessel may be captured if there are reasonable grounds for suspecting that it is breaching or attempting to breach the

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301. Andrew Sanger, *The Contemporary Law of Blockade and the Gaza Freedom Flotilla*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 397, 420 (2010), adopts this description. This is not a position reflected elsewhere. Heintschel von Heinegg *Methods and Means*, *supra* note 283, at 230–31, asserts that the blockading State has the authority to control the passage of relief consignments.

302. UK MANUAL, *supra* note 22, ¶ 13.71; NWP 1-14M, *supra* note 23, ¶ 7.7.2.5; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 296; SAN REMO MANUAL, *supra* note 26, r. 99; AMW MANUAL, *supra* note 3, r. 150 (in respect of aerial blockades the blockade must not bar access to “neutral airspace”); TALLINN MANUAL, *supra* note 3, r. 68.

303. AMW MANUAL, *supra* note 3, r. 150.

304. *Id.*, cmt. ¶¶ 1, 3 at 290–91.

305. TALLINN MANUAL, *supra* note 3, r. 68, cmt. ¶¶ 1-3 at 200–201, cmt. ¶¶ 1-13 at 195–98.

blockade.<sup>306</sup> If the blockading State has declared a blockade line, crossing or attempting to cross it would certainly constitute grounds for capture. Under the intention doctrine a vessel's public declaration of an intention to breach the blockade would be sufficient grounds for capture wherever the vessel is located.<sup>307</sup> Other conduct which would constitute grounds for capture includes loitering near the blockaded area, failing to answer radio communication from the blockading force, failure to display night navigation lights or other attempts at concealment.<sup>308</sup>

The doctrine of continuous voyage, discussed earlier in the context of contraband, was never recognized as a method of breaching a blockade.<sup>309</sup> In *The Jonge Pieter* case the English Prize Court asserted:

The blockade of Amsterdam is, from the nature of the thing, a partial blockade, a blockade by sea; and if the goods were going to Embden, with an ulterior destination by land to Amsterdam, or by an interior canal navigation, it is not, according to my conception, a breach of blockade.<sup>310</sup>

Although rejecting continuous voyage in the case of blockade, English prize law held that if a vessel were intercepted en route to a neutral port from which it intended subsequently to sail to a blockaded port, it might be captured.<sup>311</sup> English law at the time recognized the intention doctrine, so no reliance needed to be placed upon continuous voyage in making this finding. American prize law took the same view.<sup>312</sup> No contemporary manuals expressly rely on continuous voyage in the case of blockade; indeed, the German Commander's Handbook expressly rejects it.<sup>313</sup>

The law of blockade was traditionally the only lawful means of interference with enemy exports. Thus, a blockade was breached as much by egress from the blockaded port as

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306. UK MANUAL, *supra* note 22, ¶ 13.70; SAN REMO MANUAL, *supra* note 26, r. 98. Neither NWP 1-14M nor the German Commander's Handbook employ this formulation, but neither do they suggest another threshold for capture.

307. *See supra* p. 61.

308. See, e.g., the judgment of the Sasebo (Japanese) Prize Court in *The Veteran*, HURST & BRAY VOL. II, *supra* note 216, at 190.

309. *See supra* pp. 41-43.

310. *The Jonge Pieter* (1801) 4 C. Rob. 79, 83.

311. Mootham, *supra* note 178, at 71-73.

312. See cases discussed in *The Kim*, *supra* note 179, at 272-73; Gregory, *supra* note 259, at 344.

313. GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 301.

entrance to it.<sup>314</sup> Definitions in military manuals continue to support the view that vessels leaving a blockaded area are as liable to capture as those entering it.<sup>315</sup>

The traditional penalty for breach of blockade is capture, subject to later adjudication before a prize court. This position continues to be reflected in the surveyed manuals.<sup>316</sup> In many circumstances, however, there will be no need to capture a vessel to enforce the blockade, even though the blockading State is lawfully entitled to do so. Simply ordering the vessel to divert will often suffice.<sup>317</sup> Diversions preserve the effectiveness of the blockade and do not require the blockade commander to expend valuable resources capturing the vessel, appointing a prize crew and tasking one of his warships to escort it to the nearest home port. Even where vessels are captured, there may be no necessity or appetite to confiscate the vessel as prize. After Israel enforced the Gaza blockade against the so-called Freedom Flotilla, the vessels and crew were repatriated to their home States and no prize proceedings were initiated. This is another example of a development which limits the likelihood of future prize court use.

If a merchant vessel clearly resists capture, it may be warned that it might be attacked if it persists.<sup>318</sup> By analogy, a vessel which resists other enforcement activity (such as a simple diversion) may also be warned that it may be attacked if it persists. The legal basis for this position is that clear resistance renders a merchant vessel a military objective, that is, a *prima facie* lawful target for attack. Clear resistance is a question of fact in each circumstance, but the threshold is a high one. Mere evasion or attempting to flee without persisting in breaching the blockade is not sufficient. Firing upon the blockade force or attempting to ram a blockading warship would meet the threshold, as was the case in the Second World War when the British government instructed its merchant ships to resist boardings and attempt to ram German U-boats.<sup>319</sup> Even though a resisting vessel is a lawful target, before a commander may attack it he is obliged to weigh the likely military advantage to be obtained from attacking it against the number of civilian casualties the

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314. *The Juno* (1799) 2 C Rob. 119; *The Prize Cases* (The Brig Amy Warwick), 67 U.S. (2 Black) 635, 678 (1863) (in respect of the barque *Hiawatha*); Gregory, *supra* note 259, at 345.

315. See, e.g., GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 301.

316. See, e.g., UK MANUAL, *supra* note 22, ¶ 13.106.f; NWP 1-14M, *supra* note 23, ¶ 7.10.

317. See *infra* pp. 102-103.

318. NWP 1-14M, *supra* note 23, ¶ 7.10; SAN REMO MANUAL, *supra* note 26, r. 98. The UK MANUAL, *supra* note 22, ¶ 13.70, with reference to paragraph 13.46-48 is more guarded, adopting the position that determination of clear resistance may not be sufficient in all circumstances to render a vessel a military objective and thus a lawful target for attack.

319. Fenrick, *supra* note 286, at 102.

attack would be expected collaterally to cause. Incidental injuries to civilians are sometimes an inevitable consequence of a lawful attack on a legitimate military objective and are not inherently unlawful unless they are excessive.<sup>320</sup> However, the commander bears a strict duty to take all feasible measures to keep them to a minimum.<sup>321</sup>

What sort of military advantage might attacking the vessel confer? Most obvious is that allowing a vessel through the blockade seriously calls into question the blockade's effectiveness, especially if the action is part of a coordinated campaign to undermine it. After all, an ineffective blockade must be abandoned. Or it might be known that the resisting vessel is carrying cargo that will make a valuable contribution to the enemy's military effort ashore.

## 7. A Case Study: the Gaza Blockade

Many issues of controversy in the law of blockade were thrown into sharp relief by Israel's blockade of Gaza. In May 2010, a flotilla of six ships gathered in the eastern Mediterranean with the publically declared purpose of breaching Israel's blockade of Gaza. The *Mavi Marmara* was the largest ship in the flotilla. It carried activists from the Free Gaza Movement, the Turkish charity "Foundation for Human Rights and Freedoms and Humanitarian Relief" (known as IHH), others sympathetic to the circumstances of the people of Gaza and numerous journalists. IHH's reputation has been described as "chequered," with reported links to Islamic extremist organizations, including Al Qaeda.<sup>322</sup> In a series of communications culminating late on May 30, Israel informed the flotilla that unless it diverted to Ashdod, an Israeli city to the north of Gaza, and allowed its cargo to be inspected and distributed under Israeli control, Israel Defence Forces (IDF) personnel would board the vessels and prevent them from reaching the Gaza coast. When the flotilla refused to divert, the IDF boarded the ships sixty-four nautical miles outside of the declared blockade zone; five were captured without loss of life. On board the *Mavi*

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320. Additional Protocol I, *supra* note 175, art. 57.

321. *Id.* See also SAN REMO MANUAL, *supra* note 26, r. 46; UK MANUAL, *supra* note 22, ¶ 13.32; NWP 1-14M, *supra* note 23, ¶ 8.3.1.

322. James Kraska, *Rule Selection in the Case of Israel's Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 367, 370 (2010).

*Marmara*, however, nine civilian activists were killed during clashes with the IDF boarding party.

Three significant panels of inquiry have investigated the incident. Facts found and legal conclusions reached by the three panels vary greatly. Israel's inquiry was led by Supreme Court Justice Emeritus Jacob Turkel.<sup>323</sup> The Turkel Commission's report concludes the Israeli blockade was lawful as a matter of international law and that the Israeli enforcement operation was, in the main, similarly lawful. The Turkish National Commission of Inquiry included representatives from the Prime Minister's office and other government offices.<sup>324</sup> The weight of the Turkish Report's analysis and conclusions are therefore regrettably diminished because of its transparent political motivation. It concludes the blockade was unlawful and that the Israeli boarding operation, which it describes as an "attack," used excessive force. Both these reports were provided to the United Nations Secretary-General, who established his own commission headed by Sir Geoffrey Palmer to consider the incident.<sup>325</sup> The Palmer Report takes into account the findings of the two national inquiries and concludes that, while the establishment of the blockade was lawful, the Israeli boarding operation appeared to use excessive force in dealing with the passengers and crew of the *Mavi Marmara*.

The case highlights two questions in particular which warrant consideration: whether the intention doctrine reflects the law and what level of force may be employed in capturing a vessel in enforcement of a blockade. These will be considered in turn.

With respect to the intention doctrine, the Turkish Report said the early enforcement of the blockade left no room for "peaceful and non-violent alternative measures to stop the vessels."<sup>326</sup> The Palmer Report agreed.<sup>327</sup> These criticisms, while not specifically grounded in a legal objection to the intention doctrine, would likely be validly raised against every blockade enforcement action which relied upon it. It has already been seen that of the manuals surveyed only NWP 1-14M explicitly endorses the doctrine. The UK, once supportive, seems to have abandoned it. Whatever the doctrine's status in the past, the present author believes the intention doctrine cannot be considered reflective of

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323. Turkel Commission, *supra* note 254.

324. Turkish Report, *supra* note 254.

325. Palmer Report, *supra* note 254.

326. Turkish Report, *supra* note 254, at 87.

327. Palmer Report, *supra* note 254, at 53.

contemporary customary law. The lack of support for the doctrine in contemporary manuals and the widespread criticism of Israeli reliance on it in 2010 lead to this conclusion. Purely as a matter of policy, use of the intention doctrine (even if lawful) is likely to be problematic. Belligerents often wish to court international support of their cause. The perception of over-zealous enforcement of rules that might heavily impact upon neutral States' trade or use of the sea risks undermining that support.

The question of permissible use of force in blockade enforcement actions is more complex. The Turkel Commission concluded there were around 570 civilians on board the *Mavi Marmara* who took no part in resisting the IDF's attempts to board.<sup>328</sup> If the vessel had been attacked and sunk with a large loss of life, this would surely have been an unacceptable level of incidental injury, particularly when the military advantage of preventing breach of the blockade could have been achieved by carrying out an opposed boarding and capturing the vessel, as the IDF in fact did.<sup>329</sup>

Since a blockading force will be dealing almost exclusively with merchant vessels, the blockade commander's starting point must always be that individuals on board the object vessel are civilians protected from attack unless and for such time as they take a direct part in hostilities.<sup>330</sup> The International Committee for the Red Cross propounds the following test for whether an act amounts to direct participation:

1. the act must be likely adversely to affect the military operations or military capacity of a party to an armed conflict;
2. there must be a direct causal link between the act done and the harm inflicted; and
3. that act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.<sup>331</sup>

If a commander is satisfied that this test is met by persons resisting boarding, then it is lawful for his forces to attack them.

Additionally, members of the boarding party always retain their right to use force in personal self-defence or in defence of others. This may include lethal force where such

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328. Turkel Commission, *supra* note 254, at 234–42.

329. ALAN COLE ET AL., SANREMO HANDBOOK ON RULES OF ENGAGEMENT ann. D at 84 (2009) (An opposed boarding is “a boarding where the master or crew has made it clear that steps will be taken to prevent the boarding.”).

330. Additional Protocol I, *supra* note 175, art. 51(3) (reflecting customary international law).

331. NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 46 (2009).



force is proportionate and necessary, for example, when there is an imminent threat to human life and there is no other way to extinguish the threat.<sup>332</sup> There are, therefore, two legal bases upon which boarding parties may use force during a blockade enforcement action: (1) against those who directly participate in hostilities and (2) in self-defence. In many circumstances, members of the armed forces confronted with direct participants will be justified in using force in self-defence and will not need to consider the more complex direct participation formulation. That will not always be the case, however, as the *Mavi Marmara* case illustrates.

Anticipating that they would be boarded, some persons on board the *Mavi Marmara* armed themselves in order physically to repel the IDF boarding party.<sup>333</sup> The boarding party attempted to board by speedboat, but was unable to do so because some persons on board used water cannons and threw objects at the speedboats.<sup>334</sup> After the speedboat boarding failed, three helicopters inserted the boarding party. There were reports that live fire was used from the helicopter against personnel on the upper deck of the *Mavi Marmara*, although this was denied by Israel.<sup>335</sup> During the boarding, Israeli forces faced armed resistance. Israel claimed firearms were used against its forces, though none were found on board afterwards and this was denied by the activists. Before the boarding party gained control of the ship, nine activists were killed by firearms. The autopsies showed some of the bodies had multiple bullet wounds, some inflicted from behind and some at close range.

The Turkel Commission devoted much time to considering (with the benefit of hindsight) which personnel on board the *Mavi Marmara* were directly participating in hostilities.<sup>336</sup> The blockade force commander would have had far less knowledge than the Commission. Once the speedboat boarding was attempted and repelled, however, it would have been abundantly clear that there were individuals on board prepared forcibly to resist the IDF boarding. At that point it could have been concluded that the resisting members

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332. See Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, Aug. 27–Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* ¶ 9 (1990), available at <http://www.unrol.org/files/BASICP~3.PDF>. See also Trumbull, *supra* note 90, at 145–47.

333. Palmer Report, *supra* note 254, at 56 (e.g., by sawing iron bars from the guard rails and assuming agreed positions).

334. Turkel Commission, *supra* note 254, at 142.

335. Turkish Report, *supra* note 254, at 93.

336. See Turkel Commission, *supra* note 254, at 184–201.

of the passengers and crew were direct participants. If they could have been adequately identified and distinguished, they could lawfully have been targeted with sniper fire from the helicopter prior to the boarding team's landing, as was alleged by the activists but denied by Israel. The *Mavi Marmara* experience, therefore, demonstrates circumstances where a direct participation analysis would allow a commander lawfully to use force in circumstances beyond self-defence.

The Turkel Commission determined that it could not criticize the level of force used by the IDF in the fatal cases because of the level of resistance demonstrated and the consequent challenging operating environment.<sup>337</sup> However there is much to commend the view of the Palmer Report, which concluded that Israel had provided insufficient evidence as to the circumstances of the deaths to allow the panel to conclude that each of the nine could have lawfully been targeted under the law of armed conflict (i.e., that the test for direct participation had been met in each case).<sup>338</sup> The Panel of Inquiry members were rightly unpersuaded that the nine were lawfully killed in self-defence, because of the nature and number of the bullet wounds inflicted.<sup>339</sup>

## 8. Blockade: Concluding Remarks

The traditional law of blockade remains part of the customary international law of naval warfare. Despite a lack of consensus on every aspect of the law, the three investigations into the *Mavi Marmara* incident all relied on the classic law of blockade. However, this dissertation has offered the view that blockades should no longer be required to be impartial in order to be lawful. Abolition of this rule would allow blockades to be militarily effective, while avoiding unnecessary interference with neutral trade and without inflicting unnecessary deprivation upon the civilian population of the blockaded territory.

It is also clear that blockade need not be enforced by capture in every instance. Simple diversion orders to vessels which would otherwise be in breach of blockade achieve the blockading State's aim of ensuring that war-sustaining material does not enter the blockaded area. Capturing vessels and taking them for prize is onerous, time consuming

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337. *Id.* at 263–69.

338. Palmer Report, *supra* note 254, at 58–60.

339. *Id.* at 61.

and resource intensive. In the Gaza case, even once the offending vessels were captured and brought within Israeli authority, the IDF commander did not resort to prize proceedings; the vessels and crews were repatriated when circumstances allowed. Without capture there is no need for prize proceedings, and the recent developments in the practice of blockade suggest again that prize courts are an unlikely feature of future naval warfare.

This dissertation has also concluded that the intention doctrine does not reflect customary law. Israel's enforcement action sixty-four nautical miles from the blockade zone was the subject of intense criticism. The criticism would be valid in any blockade enforcement action based upon the intention doctrine. The UK's abandonment of the doctrine in its manual probably leaves only the U.S. and Israel as its proponents.

Lastly, use of force in blockade enforcement operations may be based on a direct participation in hostilities or self-defence analysis. The *Mavi Mamara* case demonstrated circumstances in which a direct participation analysis offers the blockade commander broader lawful targeting parameters than self-defence.

## B. *Maritime Zones*

Maritime zones, whereby belligerent States purport to control sea areas to the exclusion of shipping, are a relatively recent—and still controversial—development. There has been little commonality in terminology in States' operational practice in this area. Commentators, national manuals and others refer to “security” zones, “special” zones, “exclusion” zones, “war” zones, “barred” zones and others. Whether these are intended to refer to the same concept is not always clear. To make matters worse, some national manuals refer to zones with significantly different characteristics within the same umbrella term. For example, the U.S. Naval War College's Maritime Operational Zones handbook uses the phrase “warning area” to refer to a specified static sea area, but it also uses the term to refer to approach limitations around moving military assets.<sup>340</sup> However they are styled, the practice of declaring zones has the potential for significant interference with the freedom of navigation of neutral shipping. Accordingly, they are as much a part of neutrality law as blockade and the right to exclude shipping from a specific area of naval

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340. MARITIME OPERATIONAL ZONES 2-2-2-4 (Dennis Mandsager ed., 2006) [hereinafter ZONES HANDBOOK].

operations, considered later in this Part. This dissertation will consider zones under the following classifications: mobile zones (whether employed in peace or during an armed conflict), static law of naval warfare zones and static peacetime zones.<sup>341</sup>

### 1. Mobile Zones or Defensive Bubbles

Many States have employed defensive bubbles around military units to define approach limits for other vessels and aircraft, including neutral vessels and aircraft. The U.S. adopted a five nautical mile/two thousand feet defensive bubble around its units in the Persian Gulf during the last years of the Iran-Iraq War in the following terms:

U.S. Naval Forces operating in international waters are taking defensive precautions against terrorists. All surface and subsurface ships are requested to avoid closing U.S. Naval Forces closer than 5 Nm [nautical miles] without previously identifying themselves. Ships that close within 5 Nm without making prior contact and/or whose intentions are unclear . . . may be held at risk by U.S. defense measures.<sup>342</sup>

A U.S. Notice to Airmen of the same year was in similar terms, but included a 2,000 feet altitude limit. The UK declared a defensive bubble around the task group sent south to recapture the Falkland Islands in 1982.<sup>343</sup> The German Commander's Handbook declares it is the right and duty of a warship captain to defend his ship and crew, including by the "establishment of warning areas or declaration of security or defensive bubbles."<sup>344</sup>

States agree that there is no requirement of notification of the location of a mobile zone. If there were, it would entail the publication of the whereabouts of military units, information which States understandably often desire to withhold.<sup>345</sup> Although not required, the U.S. and UK practice shows that the effectiveness of the bubble depends upon public declaration that units will operate under it. Defensive bubbles are not (or should not be) binary in nature: they declare neither that all traffic outside the bubble is

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341. GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶¶ 115, 304.

342. U.S. HYDROPAC 78/17 (1984) Persian Gulf, Strait of Hormuz, Gulf of Oman.

343. Although no specific approach limit was set. Note from the British government to the Argentine government, The Right of Self-Defence (Apr. 23, 1982), *reprinted in* CENTRAL OFFICE OF INFORMATION, BRITAIN AND THE FALKLANDS CRISIS: A DOCUMENTARY RECORD 42 (1982).

344. GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 115. The CHINESE MANUAL, *supra* note 25, at 113, expressly preserves the right of warships to exercise the national right of self-defence, but does not explicitly refer to the right to declare a defensive bubble.

345. ZONES HANDBOOK, *supra* note 340, at 1-9.

safe from attack nor that all traffic which enters it may be attacked. Approach to, or entry in, a bubble should be considered as an operational consideration for the unit commander in assessing whether a detected contact (at whatever range) is hostile, friendly or neutral. Other considerations will include, *inter alia*, the contact's speed, apparent characteristics, point of origin, "identify friend or foe" signature, if any, compliance with normal flight and shipping routes, known intelligence on enemy or neutral activity, other enemy activity in the area, and many others. There is plainly nothing in law, whether in peace or during armed conflict, which prohibits a commander from using a set range from his unit (presumably set in accordance with intelligence data on the likely threat and the capabilities of the unit's weapon systems) as a consideration in assessing the threat posed by a vessel or aircraft. But the decision to establish fixed approach distances creates no duty on neutral shipping to remain outside of the declared bubble. The text of the U.S. notifications "requesting" other vessels and aircraft to remain clear of the defensive bubbles reflects this position.

Two cases are routinely used to demonstrate the potential danger of overreliance on the defensive bubble device. The *USS Stark* was operating under the U.S. defensive bubble in the Persian Gulf in 1987 at the height of the Tanker War between Iran and Iraq. She was struck by two Exocet anti-ship missiles fired by an Iraqi F-1 Mirage fighter aircraft, which apparently erroneously believed the *Stark* to be an oil tanker.<sup>346</sup> Even once the F-1 was in missile release range, *Stark* took no defensive measures and issued none of the standard warnings to the aircraft that it was approaching a U.S. Navy warship. If she had, the erroneous attack may well have been averted. This failure appears in part to have been because the F-1 was outside the defensive bubble and, therefore, considered to be non-threatening.

Less than a year later, the *USS Vincennes* was operating in the Straits of Hormuz and dealing with a threat from Iranian fast inshore attack craft. Concurrently, she became aware of an unidentified incoming air contact, which was, in fact, a civilian airliner, Iran Air Flight 655. Key informational factors could have identified it as non-threatening: its course (a recognized flight path) and its point of origin (Bandar Abbas civil airport). The commanding officer considered these, but to him they had less weight because, unusually

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346. Rear Admiral Grant Sharp, USN, Formal Investigation into the Circumstances Surrounding the Attack on the *USS Stark* (FFG 31) on 17 May 1987, at 2–3 (June 12, 1987).

for a civil airliner, the aircraft was 3–4 miles away from the centreline of the flight path, and because Bandar Abbas airport had also been used for military purposes, including the basing of strike aircraft which had launched from there within the previous twenty-four hours. Further, nearby was an Iranian P3 aircraft, which could have provided the contact with valuable targeting information. All these factors conspired to make the aircraft appear hostile. If the *Vincennes* was to stay out of missile range (and avoid the fate of the *Stark*), the commanding officer felt he needed to act immediately. He ordered that the aircraft be shot down, with the consequent loss of 290 civilian lives.<sup>347</sup>

The facts indicate the defensive bubble clouded the judgment of the *Stark* command team which believed the approaching Iraqi fighter aircraft was not a threat until it entered the defensive bubble. It is too simplistic to say that the fateful decision to shoot down Flight 655 was taken solely because the aircraft was on course to enter the bubble—other factors appeared to support the decision to take immediate defensive action.<sup>348</sup> The cases do show how overreliance on a defensive bubble can lead to opposite, but equally dangerous, assumptions: “it’s outside the bubble so can do me no harm” or “it’s on course to enter the bubble, it must intend me harm.” A defensive bubble is—and must be—but one of many operational considerations in determining how to respond to an approaching ship or aircraft.

## 2. Static Law of Naval Warfare Zones

No mention of zones is made in Hague XIII, the 1928 Havana Convention or any other treaties dealing with the law of naval warfare. The Harvard Draft Convention was specific in forbidding a belligerent from establishing “a barred zone or other area . . . in which it seeks to impose special prohibition, restriction or regulation upon the passage of neutral

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347. *Iran Airbus Crash Tied to U.S. Errors: Mistakes Were in 'Fog of War,' Report Says of Fatal Gulf Incident*, LOS ANGELES TIMES (Aug. 21, 1988), [http://articles.latimes.com/1988-08-21/news/mn-1071\\_1\\_persian-gulf](http://articles.latimes.com/1988-08-21/news/mn-1071_1_persian-gulf).

348. Although some of these factors were based on erroneous interpretation of data. For example, there was confusion in *Vincennes* as to whether the aircraft was ascending or descending. The latter would support the suspicion that it was flying an attack profile. However, the aircraft was in fact ascending. See Admiral William M. Fogarty USN, Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988, Chairman, Second Endorsement from Chairman, Joint Chiefs of Staff, to Secretary of Defense 2–7 (Aug. 18, 1988), available at [www.dod.mil/pubs/foi/International\\_security\\_affairs/other/172.pdf](http://www.dod.mil/pubs/foi/International_security_affairs/other/172.pdf). POLITAKIS, *supra* note 233, at 108–19, is less sympathetic to the commanding officer of the *Vincennes*’ position than the investigating admiral.

vessels.”<sup>349</sup> The development of static law of naval warfare zones depends almost entirely on State practice during and since the world wars. Tucker claims the development of the practice of static zones was a product of belligerent desire to achieve a blockade, without having to comply with the attendant onerous legal requirements during the world wars.<sup>350</sup>

The San Remo Manual commentary notes that by 1994 there was a considerable body of State practice of declaring zones and that many of these did not have blockade-like objectives.<sup>351</sup> Zones are described in the San Remo Manual as an “exceptional measure,” subject to the principle of proportionality.<sup>352</sup> Due regard must be had to neutrals’ legitimate use of the sea. According to the Manual, “a belligerent cannot be absolved of its duties under international humanitarian law by establishing zones which might adversely affect the legitimate uses of defined areas of the sea.”<sup>353</sup> It also provides that necessary safe passage must be provided where a zone significantly impedes access to neutral ports or coasts, or where normal navigation routes are affected and military requirements allow.<sup>354</sup> Static zones must be declared and notified.<sup>355</sup> The Manual’s provisions provide that maritime zones must be proportionate in two respects. They must not have a disproportionate effect on enemy civilians (law of armed conflict proportionality) and they must not have a disproportionate effect on legitimate neutral use of the sea (neutrality proportionality).

The use of zones is well documented in contemporary national manuals. The UK Manual, under the heading “Security zones” permits zones as a “defensive measure or to impose some limitation on the geographical extent of the area of the conflict.”<sup>356</sup> It goes on to refer to the establishment of “maritime exclusion zones and total exclusion zones.”<sup>357</sup> It is not clear whether these are intended to be construed as separate categories of zones,

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349. Harvard Draft Convention with Commentary, *supra* note 30, art. 70.

350. TUCKER, *supra* note 46, at 296–97. Commentators are clear these days to distinguish zones from blockade. *See, e.g.*, POLITAKIS, *supra* note 233, at 158–59; Heintschel von Heinegg, *Armed Conflicts at Sea*, *supra* note 266, at 545.

351. SAN REMO MANUAL, *supra* note 26, at 181–83. The drafters were apparently split as to whether such zones were lawful at all, but a simple majority considered that they were and ought to be regulated. They accepted that the rules they set forth are a novel attempt to balance the interests of belligerents and neutrals. The Helsinki Principles deal with “special” zones in similar terms. Helsinki Principles, *supra* note 10, princ. 3.3, cmt. at 505.

352. SAN REMO MANUAL, *supra* note 26, r. 106.

353. *Id.*, r. 105.

354. *Id.*

355. *Id.*

356. UK MANUAL, *supra* note 22, ¶ 13.77.

357. *Id.*, ¶ 13.77.1.

examples of security zones, or whether the phrases are to be considered interchangeable.<sup>358</sup> It is submitted that the second construction is most likely because the UK Manual goes on, in wording identical to the San Remo Manual and not limited to maritime exclusion zones or total exclusion zones, to set out the conditions under which such zones will be lawful.<sup>359</sup> U.S. and German guidance reflects the San Remo Manual position.<sup>360</sup> The Chinese Manual asserts that the declaration of a zone may not interfere with the vessels of neutral States, although acknowledges that many States have declared zones that do.<sup>361</sup> In the case of the British Total Exclusion Zone (TEZ) around the Falkland Islands in 1982, the Chinese Manual states that the declaration of the zone did not prevent the sinking of the *ARA General Belgrano* outside of the zone and observes that “this incident was not considered a violation of international law.”<sup>362</sup>

Despite congruence between the San Remo Manual and national manuals, areas of uncertainty remain. The first is rather fundamental: for what purpose is it lawful to establish a zone? Several potential purposes present themselves: protection of a high value unit, denial of a sea area to the enemy, management of battlespace, protection of neutral shipping, focusing military resources in appropriate areas, limiting the geographical scope of an armed conflict and ruse of war. A logical answer is that a zone may be established for any purpose which would be legitimate under the law of armed conflict and which does not violate any other principle or rule.

A second issue is whether zones are subject to the requirements of effectiveness and impartiality by analogy with the law of blockade. Good policy reasons suggest they are, or should be, required to be effective.<sup>363</sup> Like a blockade, a maritime zone is capable of significant interference with neutral shipping, thus the problem of paper zones could be as pernicious to neutrals as paper blockades were before the Declaration of Paris in 1856. No such policy arguments support the view that every zone must be impartially enforced against all traffic. Indeed, for a zone not to have an intolerable effect on neutral shipping, it

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358. *Id.*, ¶ 13.77. Another reason for the specific mention of “maritime” and “total” exclusion zones might be to reassert the lawfulness of the zones (by the same name) imposed by the UK during the Falklands War in 1982.

359. *Id.*, ¶ 13.78, repeating SAN REMO MANUAL, *supra* note 26, r. 106.

360. NWP 1-14M, *supra* note 23, ¶ 7.9; ZONES HANDBOOK, *supra* note 340, at 4-8; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 305.

361. CHINESE MANUAL, *supra* note 25, at 249.

362. *Id.*

363. Heintschel von Heinegg, *Armed Conflicts at Sea*, *supra* note 266, at 549.



might be entirely appropriate for it to target only enemy shipping, as did the British MEZ around the Falkland Islands.<sup>364</sup>

The consequences of a neutral's infraction of a declared zone are perhaps the principal reason for the persisting controversy surrounding zones. Entry into a declared zone by a neutral merchant vessel during the world wars often resulted in its being sunk on sight.<sup>365</sup> Commentators and national manuals are united in declaring the illegality of unrestricted warfare zones, or the complete suspension of the principle of distinction within a zone.<sup>366</sup> More recent State practice (in both declaring and responding to zones) reflects this view, as the British experience in the Falklands War demonstrates. While only the Soviet Union registered an official protest, the British TEZ was criticized on the ground that it seemed to affect a free fire zone.<sup>367</sup> The words used in declaring the zone gave that impression: "any ship or aircraft . . . within this zone without authority from the Ministry of Defence in London will be . . . regarded as hostile and will be liable to attack by the British forces."<sup>368</sup>

The critical response to that phraseology demonstrates the widespread view that the declaration of a zone is not grounds to abandon the principle of distinction, or otherwise modify the application of the law of armed conflict within the zone.<sup>369</sup> On the commencement of Operation Iraqi Freedom in March 2003, the U.S. declared a maritime safety zone in the eastern Mediterranean Sea while conducting carrier and missile strike operations into Iraq. The penalty for infraction was visit and search by U.S. forces. The stated purpose of the zone was battlespace management, given the high intensity of offensive operations being conducted therein. It lasted only as long as strike operations

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364. John Nott, Secretary of State for Defence, Speech in the House of Commons (Apr. 7, 1982), HANSARD ONLINE, [http://hansard.millbanksystems.com/commons/1982/apr/07/falkland-islands#S6CV0021P0\\_19820407\\_HOC\\_423](http://hansard.millbanksystems.com/commons/1982/apr/07/falkland-islands#S6CV0021P0_19820407_HOC_423).

365. A famous example was the sinking of the *SS Lusitania* by a German submarine in 1915.

366. See, e.g., Heintschel von Heinegg, *Armed Conflicts at Sea*, *supra* note 266, at 540–41; POLITAKIS, *supra* note 233, at 162. The 1936 London Protocol is often cited in support of this position. Procès-Verbal: Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930, Nov. 6, 1936, 173 L.N.T.S. 353, 3 Bevens 298, *reprinted in* 31 AMERICAN JOURNAL OF INTERNATIONAL LAW SUPPLEMENT 137 (1939) [hereinafter 1936 London Protocol].

367. Fenrick, *supra* note 286, at 111–12.

368. POLITAKIS, *supra* note 233, at 76–77.

369. One commentator has suggested, however, that the principle of distinction may operate differently inside a zone. Heintschel von Heinegg, *Armed Conflicts at Sea*, *supra* note 266, at 548 ("the demands resulting from the principle of distinction are less strict than outside an exclusion zone"). This is probably because (particularly in respect of an exclusion zone) the fact of presence within a zone is itself evidence—although far from conclusive—that can support a vessel's classification as a legitimate military objective under the San Remo Manual test. SAN REMO MANUAL, *supra* note 26, r. 40.

persisted.<sup>370</sup> This operation represents a contemporary example of a lawful zone. It was proportionate and reasonable, and asserted no more control in its extent, duration and effect on neutral shipping than was necessary in order to conduct the relevant operation.

The appropriate penalty for a neutral vessel in breach of a zone is a matter of conjecture. As far as the author is aware, no belligerent has sought to enforce a zone by capturing vessels in breach as prize. The UK never had to enforce its Falkland Islands TEZ in 1982 so the issue of the penalty never arose. Both belligerents in the Iran/Iraq War declared zones. Their mode of enforcement, however, was indiscriminate and widely condemned, adding further support, were it needed, for the position that attack is a disproportionate and unlawful penalty.<sup>371</sup> Fenrick concluded:

An attempt to appraise legal aspects of the use of exclusion zones in the Iran/Iraq conflict must take cognizance of the fact that neither belligerent appears to be paying particular heed to legal issues in determining their courses of action. . . . About Iranian conduct, one can quote J W Garner again concerning German war zones and simply observe, it was so flagrantly contrary to the laws of maritime warfare that nothing can be said in defence of it.<sup>372</sup>

U.S. practice in 2003 suggests that simple diversion or visit and search is an appropriate way for belligerents to deal with zone infractions, without need to resort to capture. If zones are not enforced by capture, then prize proceedings will not result, again demonstrating that prize proceedings are an unlikely feature of future naval warfare.

### 3. Static Peacetime Zones

UNCLOS permits States to declare safety zones around artificial islands in the exclusive economic zone or above the continental shelf and around scientific research installations, even when on the high seas.<sup>373</sup> Other static peacetime zones might be declared pursuant to the freedom of the high seas. For example, temporary warning zones might be created to facilitate weapons testing or military exercises.<sup>374</sup> There is no obligation on neutral States to suspend their own uses of such zones during an armed conflict. If belligerent forces are

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370. Dale Stephens, *Law of Naval Warfare and Zones*, in ZONES HANDBOOK, *supra* note 340, at 4-1, 4-17.

371. See POLITAKIS, *supra* note 233, at 92 (“in fact the Iraqi exclusion zone closely resembles the type of unrestricted warfare Germany conducted . . . in World War II”).

372. Fenrick, *supra* note 286, at 121.

373. UNCLOS, *supra* note 32, arts. 60(4), 80, 260.

374. ZONES HANDBOOK, *supra* note 340, at 2-2.

operating in neutral States' exclusive economic zones, or in the vicinity of neutrals exercising their high seas freedoms in these ways, they will be obliged to have "due regard" for the neutral States' activities.<sup>375</sup>

The corollary of this is that neutral States must have due regard for belligerents' legitimate uses of the high seas under the law of naval warfare. For example, it would not be acceptable for a neutral State to interfere in a belligerent's right to establish and enforce a blockade by establishing an overlapping warning zone in order to conduct a military exercise. Finally, it should be noted that modern military manuals are clear that the declaration of a static control or exclusion zone might be a legitimate measure taken under the inherent right of self-defence in appropriate circumstances.<sup>376</sup>

### C. *The Immediate Vicinity of Naval Operations*

The right of belligerents to exclude neutral shipping from the immediate vicinity of naval operations is recognized as a well-established rule in the commentary to the Helsinki Principles.<sup>377</sup> It receives recognition in the San Remo Manual.<sup>378</sup> NWP 1-14M and the UK Manual reflect the San Remo Manual position.<sup>379</sup> The German Commander's Handbook states that belligerents "are permitted to establish special restrictions for neutral maritime and air transport."<sup>380</sup> The Chinese Manual recognizes belligerent authority to exclude shipping from "naval battlefields."<sup>381</sup> Neutral vessels are obliged to obey orders from belligerents in the immediate area of naval operations; in these circumstances belligerents' security interests outweigh the freedom of navigation of neutral shipping.<sup>382</sup> Any neutral ship which disobeys belligerent orders is liable to capture or diversion. Where a neutral

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375. UNCLOS, *supra* note 32, arts. 59, 87(2).

376. UK MANUAL, *supra* note 22, ¶ 13.77.1; NWP 1-14M, *supra* note 23, ¶ 2.6.4; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 115. The CHINESE MANUAL, *supra* note 25, at 113, is less clear on the matter, but discusses other measures which may be taken in self-defence.

377. Helsinki Principles, *supra* note 10, cmt. at 505. The rule received only oblique reference in the Harvard Draft Convention with Commentary, *supra* note 30, art. 70, cmt. at 694-96.

378. SAN REMO MANUAL, *supra* note 26, r. 146(e).

379. NWP 1-14M, *supra* note 23, ¶ 7.8; UK MANUAL, *supra* note 22, ¶ 13.106.

380. GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 305.

381. CHINESE MANUAL, *supra* note 25, at 248.

382. SAN REMO MANUAL, *supra* note 26, ¶ 146.6.

vessel's disobedience or interference confers a positive advantage upon one belligerent, the circumstances might even render it a legitimate military objective at risk of attack.<sup>383</sup>

There is seemingly no requirement that the immediate vicinity of naval operations be declared before the rule may be enforced. There is little guidance on the definition of immediate vicinity, but given the words used and the broad rights of control enjoyed by belligerents within, a narrow construction seems to be intended. Tucker was clear that the right was a transient one and only pertained to an area where naval hostilities were actually taking place or belligerent forces were operating.<sup>384</sup> He concluded, consistent with a narrow construction, that the rule was not a “serious restriction upon neutral freedom of navigation on the high seas.”<sup>385</sup> This view is consistent with the position of modern military manuals.

Recent State practice also supports Tucker's position. In 2011, NATO members and partner States launched air and missile strikes from the sea into Libya. These have been described as “battlespace shaping operations” for subsequent enforcement of U.N. Security Council Resolution 1973.<sup>386</sup> As circumstances required, merchant shipping was ordered by radio transmissions to remain clear from sea areas where cruise missile launches were taking place. The orders remained in force only so long as strikes were carried out.<sup>387</sup>

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383. *Id.*; NWP 1-14M, *supra* note 23, ¶ 7.8; UK MANUAL, *supra* note 22, ¶¶ 13.106, 13.92.

384. TUCKER, *supra* note 46, at 300–301.

385. *Id.* at 301 (comparing this right to belligerent establishment of “war zones,” a practice in which he considered “there may be found a serious—and perhaps even a fatal—blow to the traditional law”).

386. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011), *available at* [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1973(2011)). *See also* CLAIRE TAYLOR, MILITARY OPERATIONS IN LIBYA 5 (2011), *available at* <http://www.parliament.uk/business/publications/research/briefing-papers/SN05909/military-operations-in-libya>.

387. The author was a member of HMS *Cumberland*'s command team during her involvement in Security Council Resolution 1973 enforcement operations.

## PART FIVE: UNNEUTRAL SERVICE

The phrase unneutral service was first coined by Sir Christopher Robinson, an English Admiralty court reporter in the 1800s.<sup>388</sup> He used it to describe two unneutral acts which the English Prize Court had begun to treat more severely than mere carriage of contraband—the carriage of enemy troops and the carriage of enemy dispatches. Previously, international treaties and domestic prize courts had treated soldiers and dispatches merely as varieties of contraband. However, the jurisprudence of the English Prize Court during the Napoleonic Wars took a different approach, thereby influencing international law.<sup>389</sup> Henceforth, unneutral service was characterized by closeness to the enemy, which was more culpable. In giving judgment in *The Friendship* (1807), Sir William Scott said, “It is the case of a vessel letting herself out in a distinct manner, under a contract with the enemy’s government . . . which cannot be considered to be permitted to neutral vessels. . . .”<sup>390</sup> Accordingly, in the early 1800s, the English Prize Court penalized unneutral service not just by seizure of the offending items or persons carried, but also by condemnation of the vessel itself.<sup>391</sup> The concept grew and grew. Writing in 1955, Tucker said that unneutral service “has come to signify little more than any service rendered by a neutral subject to a belligerent contrary to international law, excluding the acts of contraband carriage or blockade breach.”<sup>392</sup> He then divided unneutral service into three categories: unneutral service which results in liability for treatment as an enemy warship; unneutral service which results in liability for treatment as an enemy merchant ship; and unneutral service which results in liability for seizure.<sup>393</sup> This Part will proceed on the basis of Tucker’s classification, before assessing whether it still reflects the law.

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388. Norman L. Hill, *The Origin of the Law of Unneutral Service*, 23 AMERICAN JOURNAL OF INTERNATIONAL LAW 56, 66 (1929).

389. *Id.* at 58.

390. 4 C. Rob. 420, 428–29.

391. This practice was also adopted in prize courts outside the UK. In *The Nigretia* (1905), the Japanese Higher Prize Court dismissed an appeal against a decision of the Sasebo Prize Court to condemn a neutral vessel for the carriage of two Russian naval officers. HURST & BRAY VOL. II, *supra* note 216, at 201–16.

392. TUCKER, *supra* note 46, at 318, 318 n.1 (He conceded that “this can hardly be regarded as a satisfactory definition, yet it is perhaps the best that can be given.”).

393. *Id.* at 318–31. For the 1909 Declaration of London’s classification of unneutral service, see Scott, *supra* note 161, at 524–25.

A. *Enemy Warship Unneutral Service*

The law of naval warfare allows enemy warships to be attacked on the basis of their status. Tucker said that neutral vessels which directly participate in the military operations of the belligerent, whether by entering into actual hostilities or by serving as an auxiliary, also render themselves liable to attack on sight.<sup>394</sup> More recently, the San Remo Manual has stated, in language mirroring Additional Protocol I, Article 52(2), that merchant ships may be attacked if, by their nature, location, purpose or use they make an effective contribution to the enemy's military effort.<sup>395</sup> Other contemporary manuals agree that neutral merchant vessels may be attacked when they participate in the enemy's war effort.<sup>396</sup> Conduct which renders a neutral merchant vessel liable to attack includes being incorporated into an enemy's intelligence system, sailing under convoy of enemy warships, laying mines, minesweeping, cutting undersea cables, attacking friendly merchant ships and acting as an auxiliary.<sup>397</sup> Acting as an auxiliary includes carrying troops or supplies for warships or task groups and would encompass, as an example, the merchant ships taken up from trade used by the UK during the Falklands conflict.<sup>398</sup>

Before an offending neutral merchant vessel might be attacked, however, the 1936 London Protocol seems to require that its passengers, crew and papers be placed in safety by providing:

[E]xcept in the case of a persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship . . . may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety.<sup>399</sup>

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394. TUCKER, *supra* note 46, at 319–20. Harvard Draft Convention with Commentary, *supra* note 30, art. 65, cmt. at 658 (It also provided that a neutral vessel which participated in hostilities or acted as an auxiliary could be treated as an enemy warship.).

395. *See, e.g.*, SAN REMO MANUAL, *supra* note 26, r. 40.

396. Helsinki Principles, *supra* note 10, princ. 5.1.2(4)(a)–(e); UK MANUAL, *supra* note 22, ¶ 13.47; NWP 1-14M, *supra* note 23, ¶¶ 7.5.2, 8.6.2.2; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶¶ 273–74; CHINESE MANUAL, *supra* note 25, at 265.

397. SAN REMO MANUAL, *supra* note 26, r. 67(b)–(f), ¶¶ 67.24–26.

398. *Id.*

399. 1936 London Protocol, *supra* note 366, art. 2.

National manuals specifically acknowledge the limitations imposed by the 1936 London Protocol.<sup>400</sup> The San Remo Manual and Helsinki Principles also make explicit reference to it in their commentaries.<sup>401</sup> It seems unlikely, however, that these manuals are asserting that a neutral merchant ship which is, for example, attacking friendly merchant ships cannot be attacked unless Article 2 has first been satisfied. The general law of armed conflict would not place such an onerous burden upon belligerents. 1977 Additional Protocol I, Article 52(2), provides:

[A]ttacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

Article 52(2) reflects customary law that plainly applies at sea.<sup>402</sup> Once the Article 52(2) test is satisfied, a proportionality assessment is required.<sup>403</sup> This collateral damage estimate need not consider members of the passengers and crew of the vessel who are direct participants in hostilities.<sup>404</sup> On the other hand, the London Protocol seems to provide that in respect of attacks on merchant ships not only is collateral damage forbidden, but that even passengers and crew who are direct participants must be removed to safety before a neutral vessel may be attacked.<sup>405</sup> This would be an unjustifiable limitation on targeting discretion and surely cannot be intended. As one commentator has suggested, “there is no reason in either experience or logic why the London Protocol should be interpreted as protecting neutral merchant ships which are engaged in the same functional activities that result in lack of protection for an enemy merchant ship.”<sup>406</sup> The German Commander’s Handbook shares this view, saying, “the provisions of the London Protocol are based on

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400. UK MANUAL, *supra* note 22, ¶ 13.47.f; NWP 1-14M, *supra* note 23, ¶ 8.6.2.2; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 273; CHINESE MANUAL, *supra* note 25, at 258.

401. SAN REMO MANUAL *supra* note 26, ¶ 60.10 (referring to the U.S. Navy manual, which was NWP 9, the predecessor to NWP 1-14M); Helsinki Principles, *supra* note 10, princ. 5.1.2(3)–(4), cmt. at 508.

402. Despite the language in Article 49(3) of Additional Protocol I, *supra* note 175, stating that the Protocol’s provisions do not apply to pure law of naval warfare scenarios, the drafters of the San Remo Manual used exactly the text of the Protocol’s Article 52(2) in framing rule 40. The same text appears in the UK MANUAL, *supra* note 22, ¶ 13.26.

403. Additional Protocol I, *supra* note 175, art. 57.

404. *Id.*, art. 51(3).

405. For a discussion of the concept of direct participation, see *supra* pp. 71-73.

406. W. T. MALLINSON JR, STUDIES IN THE LAW OF NAVAL WARFARE: SUBMARINES IN GENERAL AND LIMITED WARS 130 (1968) (Vol. 56, U.S. Naval War College International Law Studies).

the assumption that the vessels concerned are merchant vessels only performing their original civilian functions, i.e., not taking any part in the hostilities.”<sup>407</sup>

Another provision which may now affect a belligerent’s response to a neutral merchant vessel committing enemy warship unneutral service is the prohibition on the use of force found in Article 2(4) of the U.N. Charter. An attack on a neutral-flagged merchant vessel may amount to a use of force against the neutral flag State and, therefore, be forbidden by Article 2(4). A small group of the drafters of the San Remo Manual thought as much, opining that in all cases an attack on a neutral merchant vessel required separate justification as self-defence under Article 51 of the Charter.<sup>408</sup> The majority, however, rejected that position, saying that the U.N. Charter had no role to play in determining the legality of belligerents’ conduct during an armed conflict.<sup>409</sup>

The position of the minority deserves further scrutiny. During the Iran-Iraq War, the U.S. relied upon self-defence following alleged Iranian attacks on its flagged vessels, including merchant vessels. The *MV Sea Isle City* was a merchant oil tanker struck by a missile on October 16, 1987.<sup>410</sup> The *MV Bridgeton*, another merchant vessel, struck a mine (alleged by the U.S. to be Iranian) in the central Arabian Gulf. The U.S. claimed that Iran was using two oil platforms to coordinate attacks on neutral merchant shipping, and, having cleared them of personnel, destroyed them. The U.S. subsequently reported these acts to the U.N. Security Council as acts of self-defence pursuant to Article 51 of the U.N. Charter. Here the U.S. was in the position of a neutral State vis-à-vis belligerent Iran. It plainly considered that the U.N. Charter governed its relations with the belligerent States and that the alleged attacks on each vessel amounted to uses of force. Indeed, the U.S. considered the attacks were not only uses of force, but armed attacks justifying a forcible response under Article 51. This position tends to support the approach of the minority at San Remo. However, in the resulting *Oil Platforms* litigation, the I.C.J. rejected the U.S. claim to have been acting in self-defence on a number of bases, observing in the process

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407. GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 273.

408. SAN REMO MANUAL, *supra* note 26, ¶ 67.3.

409. *Id.*

410. *Sea Isle City* was a Kuwaiti oil tanker reflagged to the United States shortly prior to the attack. See further Scott Davidson, *United States Protection of Reflagged Kuwaiti Vessels in the Gulf War: The Legal Implications*, 4 INTERNATIONAL JOURNAL OF ESTUARINE AND COASTAL LAW 173 (1988).



that it doubted an attack on a merchant vessel could ever amount to an armed attack on the vessel's flag State.<sup>411</sup> The I.C.J.'s position tends to support the San Remo majority.

The U.S.'s own manual, NWP 1-14M, also supports the position of the majority that neutral merchant vessels which are making an effective contribution to a belligerent's war effort may be attacked without separate justification under Article 51.<sup>412</sup> The U.S. plainly saw no contradiction between this provision in NWP 1-14M and the action it took against Iran. The U.S. doctrine in NWP 1-14M and its experience during the Tanker War suggests that States have a discretion as to whether they view an attack on one of their merchant ships as a use of force or an armed attack against them. Whether they do or not will depend on the circumstances. For example, if the *Sea Isle City*, instead of being an oil tanker engaged in commercial activity, was a passenger ship contracted to the Iraqi government and acting as a troop carrier (even though still under a U.S. flag), it is unlikely the U.S. would have claimed a right to act in self-defence if Iran attacked it.

#### B. *Enemy Merchant Ship Unneutral Service*

According to Tucker, operating under the direct control of a belligerent government, but performing service short of participation in operations or acting as an auxiliary, means a neutral vessel acquires enemy character and may be treated in the same way as an enemy merchant ship. He gives being chartered to a belligerent government to make commercial voyages on its behalf as an example.<sup>413</sup> Unlike enemy warship unneutral service, this behaviour does not justify attack under the law of armed conflict. Therefore, for targeting purposes, distinguishing between enemy and neutral merchant vessels is largely meaningless. What matters in the targeting context is whether the merchant vessel may be said to be a legitimate military objective, not whether it is enemy or neutral flagged.<sup>414</sup>

Outside of targeting, the distinction between the two once did have significance. Enemy merchant vessels may be subject to capture and condemnation.<sup>415</sup> Neutral vessels must perform some offence before they may be captured and condemned as a prize, e.g.,

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411. *Oil Platforms*, *supra* note 91, ¶ 64.

412. NWP 1-14M, *supra* note 23, ¶¶ 7.5.2, 8.6.2.2.

413. TUCKER, *supra* note 46, at 322.

414. See SAN REMO MANUAL, *supra* note 26, ¶¶ 67.6–67.10.

415. *Id.*, r. 135; UK MANUAL, *supra* note 22, ¶ 13.99; NWP 1-14M, *supra* note 23, ¶ 8.6.2.1.

carriage of contraband, breach of blockade, etc. Furthermore, once capture has been affected, belligerents traditionally enjoyed broad discretion to destroy enemy merchant vessels, whereas discretion to destroy neutral prizes was strictly limited.<sup>416</sup> But that position seems to have changed. The San Remo Manual considers that a merchant ship of any variety may only be destroyed when (1) military circumstances preclude taking the vessel as a prize and (2) there can be compliance with the 1936 London Protocol requirement concerning the safety of the ship's crew, passengers and papers. It makes no distinction between enemy and neutral merchant vessels. The U.S. Manual and German Commander's Handbook reflect the same position.<sup>417</sup>

The UK Manual still draws a distinction between captured enemy and neutral merchant vessels. In the case of enemy merchant vessels, the UK Manual provisions are the same as those in the San Remo Manual.<sup>418</sup> With respect to neutral merchant vessels, however, the UK maintains a position it has held since the nineteenth century: that destruction of a neutral prize is never permitted. Neutral prizes which are not taken for adjudication must be released, on the UK view. The earliest authority for this position is *The Felicity* (1819).<sup>419</sup> In that case, Sir William Scott set out the duties of a commander who is not in a position to take a ship as a prize due to military circumstances. In the case of an enemy ship, Scott said, "Under this collision of duties nothing was left but to destroy her, for they could not . . . permit the enemy's property to sail away unmolested. If impossible to bring it in, their next duty is to destroy enemy's property."<sup>420</sup> In respect of a neutral ship, he went on:

[T]he act of destruction cannot be justified to the neutral owner, by the importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These are rules so clear in principle and established in practice that they require neither reasoning nor precedent to illustrate or support them.<sup>421</sup>

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416. TUCKER, *supra* note 46, at 349–54.

417. NWP 1-14M, *supra* note 23, ¶ 8.6.2.2 (enemy merchant vessels), ¶ 7.10.1 (neutral merchant vessels). NWP 1-14M does not specifically address the destruction of an enemy merchant vessel *after* capture, but does make explicit reference to the 1936 London Protocol in relation to the attack of enemy merchant vessels under the heading "Destruction." It may thus be safely inferred that the U.S. position reflects the San Remo position. The GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 288, is much clearer in favouring the San Remo position. The Chinese Manual does not address this issue.

418. UK MANUAL, *supra* note 22, ¶ 13.103. *See also* Haines, *supra* note 131, at 98.

419. 2 Dods. 381.

420. *Id.* at 386.

421. *Id.*

The rule established in *The Felicity* has remained the British view since that case was decided.<sup>422</sup>

For States, such as the U.S. and Germany, which recognize no difference in the lawful treatment of neutral and enemy prizes after capture, this type of unneutral service may be safely assimilated into Tucker's third category of "unneutral service which results in liability for seizure," discussed presently. For the UK, the distinction between Tucker's second and third category of unneutral service is illusory in all but the most exceptional of circumstances. It has already been observed that captures in prize are an unlikely feature of future naval warfare. Circumstances where there may be a need to destroy or release a prize after capture are therefore extremely unlikely. It is safe to conclude that Tucker's "enemy merchant ship" category of unneutral service serves no purpose in the modern law.

### C. *Unneutral Service Which Results in Liability to Seizure*

Tucker concluded that the carrying of certain enemy persons or dispatches would result in liability to seizure, because it "may be undertaken in much the same manner as the carriage of contraband, that is without implying a direct control by—or even a close relationship with—the belligerent."<sup>423</sup> It is interesting that Tucker adopts this position, as it was precisely the proximity to the belligerent that led the English Prize Court to distinguish these two acts from general contraband carriage. If he is right, it may no longer make sense to continue to classify carriage of enemy persons and dispatches as distinct from carriage of contraband. This is especially true if, as is widely held, serious examples of carriage of contraband may result in condemnation of the vessel in addition to condemnation of the cargo. Nonetheless the substance of the traditional rules will be considered before this question will be assessed.

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422. The history of the British position is set out in the Harvard Draft Convention with Commentary, *supra* note 30, cmt. at 566–68.

423. TUCKER, *supra* note 46, at 324.

## 1. Carriage of Enemy Persons

The 1802 English prize case of *The Carolina*<sup>424</sup> was the first in which transportation of members of the armed forces of a belligerent was established as a species of unneutral service. The *Carolina* was a Swedish-flagged vessel employed as a French troop transport between French colonies and Alexandria, Egypt during the Napoleonic Wars. On her last voyage before capture, she had carried one hundred and fifty French dragoons to Alexandria. During the British campaign for Alexandria, the British forces permitted all neutral ships to leave the port, but the *Carolina* did not sail until four days later, claiming that the French commander would not permit her to do so. She was captured by the British. During prize proceedings, it was argued on the vessel owner's behalf that (a) her capture was unlawful because she was not *in delicto* at the time of capture and (b) that she was forced into the action by French duress. Sir William Scott accepted neither argument. As to the first he found as a matter of fact that the vessel was still under contract to the French and, therefore, still *in delicto*, even though the offending troop carriage had been completed.<sup>425</sup> As to the second he found that a belligerent cannot entertain claims of duress by the other belligerent. The proper mode of redress for such oppressive conduct lay against the belligerent government that had applied the duress and caused the vessel owner's loss.<sup>426</sup>

The facts of *The Carolina* beg the question of when carriage of enemy persons becomes acting as an auxiliary justifying not just capture, but attack as a legitimate military objective. This will be a question of fact in each circumstance, based on application of the criteria in Additional Protocol I, Article 52(2). If the *Carolina* had been caught in the act by British forces, she would doubtless have been a lawful target under the law of armed conflict and liable to attack on sight.

A contentious issue in the negotiations leading to the 1909 Declaration of London was whether belligerents enjoyed the right to remove enemy persons from a neutral vessel

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424. 4 C. Rob. 256.

425. *Id.* at 261. Other commentators (e.g., Hill, *supra* note 388, at 64) have cited the case as authority for the position that a vessel which commits unneutral service need not be *in delicto* in order to be subject to capture, but given Sir William Scott's finding of fact, the case is not authority for that position.

426. *Id.* at 260. See also *The Friendship*, *supra* note 390; *The Orozembo* (1807) 6 C. Rob. 430.

where there are no independent grounds to capture the vessel.<sup>427</sup> In the end, the Declaration did provide for such a right, even in the face of stiff U.S. disapproval.<sup>428</sup> It extended only to members of the enemy armed forces. Tucker concluded that “the practice of states may be regarded as having sanctioned this measure.”<sup>429</sup> However, despite the terms of the Declaration of London, he was not able to state the boundaries of the rule. Was it limited to members of the enemy armed forces, or did it include, for example, males of military age, or even “any person of value to an enemy’s war effort—particularly scientists”?<sup>430</sup>

One case which might support a broad interpretation of the rule involved the Japanese passenger steamship *Asama Maru* in 1940 (when Japan was still neutral in the Second World War). A Royal Navy destroyer visited and searched the vessel on the high seas, but only thirty-five nautical miles off the coast of Japan. The destroyer’s commanding officer ordered the removal of twenty-one of fifty German passengers on board. The Japanese protested the proximity of the visit to the Japanese coast and claimed that international law only permitted the capture of members of the armed forces. The British government justified the capture on the basis that “assuming that a right to remove enemy nationals from neutral ships exists at all (and this is not disputed by the Imperial Japanese Government), it must include persons returning to their own country for the purpose of fulfilling the obligation of military service which is imposed upon them by law.”<sup>431</sup> The Japanese response stated that the British had confused the right to detain persons having lawfully captured the vessel as a prize with the more specific right contained in the Declaration of London. A compromise was eventually reached whereby the UK returned nine of the twenty-one passengers to Japan as unsuited for military service, and the Japanese government having assured the British government that passage in Japanese-flagged vessels would henceforth be refused to belligerent military personnel or persons

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427. There would be no grounds for capture, for example, where the enemy individual had privately paid for his passage and was traveling in his private capacity, an exception contemplated by Sir William Scott in *The Friendship* (1807), *supra* note 390.

428. Declaration of London, *supra* note 151, art. 47; Scott, *supra* note 161, at 526.

429. TUCKER, *supra* note 46, at 328, 328 n.16.

430. *Id.* at 329, 329 nn.18–19.

431. Letter from Sir Robert Craigie, British Ambassador to Japan, to the Japanese Vice Minister for Foreign Affairs (Jan. 27, 1940), extract reprinted in Herbert W. Briggs, *Removal of Enemy Persons from Neutral Vessels on the High Seas*, 34 AMERICAN JOURNAL OF INTERNATIONAL LAW 249, 251 (1940). The position adopted by the British ambassador is almost exactly that taken in Article 62 of the Harvard Draft Convention.

suspected of so being.<sup>432</sup> A contemporary U.S. commentator concluded that the British had acted in excess of the law and that the right of seizure of belligerent nationals from a neutral vessel was only lawful in the case of military personnel. He cited the U.S. government's position during the First World War in support of his view.<sup>433</sup>

Positions have shifted somewhat in the intervening years. The contemporary UK Manual does not assert a belligerent right to capture enemy personnel of any sort in neutral shipping. Neither do the San Remo Manual or the Helsinki Principles. The German Manual seems only to contemplate capture of enemy personnel in a neutral merchant vessel after it has been captured as a prize.<sup>434</sup> In stark contrast to the U.S. position up to 1940, the contemporary U.S. Manual is alone among the manuals surveyed in asserting the rule as follows:

Enemy nationals found on board neutral merchant vessels and civil aircraft as passengers who are actually embodied in the military forces of the enemy, who are en route to serve in the enemy's armed forces, who are employed in the public service of the enemy, or who may be engaged in or suspected of service in the interests of the enemy may be made prisoners of war . . . whether or not there is reason for [the vessel or aircraft's] capture as a neutral prize.<sup>435</sup>

No authority is cited in support of this position in the U.S. Manual, nor in the most recent annotated supplement.<sup>436</sup> It is unlikely that the U.S. position reflects contemporary customary law.

## 2. Carriage of Dispatches for the Enemy

*The Constitution* (1802)<sup>437</sup> was the first case to apply principles of unneutral service to the carriage of enemy dispatches. Subsequently in *The Atalanta* (1808),<sup>438</sup> Sir William Scott found that knowledge (whether real or construed in cases where a lack of due diligence is

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432. *Id.* at 253.

433. *Id.* at 255–58.

434. GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶¶ 289–90. The Chinese Manual does not address this issue.

435. NWP 1-14M, *supra* note 23, ¶ 7.10.2.

436. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (A. R. Thomas & James C. Duncan eds., 1999) (Vol. 73, U.S. Naval War College International Law Studies).

437. 6 C. Rob. 455.

438. *Id.* at 440.

displayed) is required before the court will order condemnation of the vessel.<sup>439</sup> While carriage of dispatches for an enemy might have been of potentially catastrophic effect on the wronged belligerent in 1808, Tucker notes that by 1955 due to technological developments this was no longer the case.<sup>440</sup> If true in 1955, it is *a fortiori* the case now and it may safely be concluded that the old carriage of dispatches rule has fallen into desuetude. Indeed, even by 1909 the Declaration of London preferred the term “transmission of information in the interest of an enemy,”<sup>441</sup> and it is this phrase which is employed in the U.S. Manual as a grounds justifying capture of a neutral merchant vessel.<sup>442</sup>

Tucker rightly concluded that fitting new forms of communication into a legal framework designed to regulate quite different acts was a misleading endeavour.<sup>443</sup> If a neutral merchant vessel transmitted information to the enemy by radio or other instantaneous form of communication, the effect on the wronged belligerent might be immediate and disastrous, and sufficient to render that vessel a lawful object of attack. An example of this occurred during the Falklands conflict in 1982. The Argentine-flagged fishing trawler *Narwal* repeatedly reported the position of UK forces to Argentinian authorities and was accordingly attacked and disabled by British forces on May 9. It is irrelevant that the *Narwal* was Argentinian- vice neutral-flagged: what matters is that she was by her use making an effective contribution to military action and that her destruction, in the circumstances ruling at the time, offered a definitive military advantage.<sup>444</sup>

#### D. *Unneutral Service: Concluding Remarks*

Tucker’s three categories of unneutral service require substantial revision. Beginning with the last seizure category, the old carriage of dispatches rule has fallen into desuetude. Carriage of enemy troops still amounts to grounds for capture and might lawfully be subject to punitive prize measures, but no more so than serious cases of carriage of

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439. *Id.* at 459.

440. TUCKER, *supra* note 46, at 330 (although he concluded that the customary rules in respect of dispatches still had force).

441. Declaration of London, *supra* note 151, art. 45(1).

442. NWP 1-14M, *supra* note 23, ¶ 7.10 (although the word “communicating” is used vice “transmission”).

443. TUCKER, *supra* note 46, at 331.

444. For an account of the attack on the *Narwal*, see SANDY WOODWARD, ONE HUNDRED DAYS: THE MEMOIRS OF THE FALKLANDS BATTLE GROUP COMMANDER 191–95 (1997).

contraband. The policy reasons for the English court's innovation in the early 1800s no longer pertain and carriage of enemy troops may, once again, be viewed as a species of contraband carriage. An exception to this is where carriage of enemy troops is of sufficient consequence to render the vessel treatable as an enemy auxiliary, in which case she may be attacked on sight. Tucker's enemy warship unneutral service should instead be labelled "unneutral service resulting in liability to attack."

Accordingly, the law now recognizes two categories of unneutral service: first, that resulting in liability to attack and, second, that resulting in liability to seizure. This way, the law can accommodate emerging ways of committing unneutral acts. For example, Walker has suggested that Internet messages or hacks which contribute to enemy warfighting efforts may be equated with neutral shipping which commit unneutral acts.<sup>445</sup> Heintschel von Heinegg has argued that for a neutral knowingly to allow the transmission of a belligerent cyber attack through its cyber infrastructure would be in breach of its neutrality obligations.<sup>446</sup> Were either of these acts committed by a neutral vessel at sea, this unneutral service would surely now be grounds for capture (or even attack). The criteria of knowledge and culpability which characterized the traditional law should ensure that unneutral service will only be grounds for intercepting (or attacking) neutrals who have accepted this risk. In that way, the law of unneutral service is not the overbearing collection of belligerent rights to interfere with neutrals that Tucker worried it might become, but it is flexible enough to accommodate new ways for neutrals to infringe their impartiality obligations.

Parts Three and Four concluded that simple diversions might be sanction enough against neutral vessels carrying contraband or attempting to breach a belligerent controlled area, such as a blockaded coast or maritime zone. However, unneutral service contemplates acts which might be committed by a neutral vessel without transiting anywhere. Carrying out Internet hacks or transmitting a cyber attack might just as easily be carried out at anchor as underway. Accordingly, ordering a diversion or course change might be insufficient to remedy the unneutral act being committed. Unneutral service might

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445. George K. Walker, *Neutrality and Information Warfare*, in *COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW* 233, 239 (Michael N. Schmitt & Brian T. O'Donnell eds., 2002) (Vol. 76, U.S. Naval War College International Law Studies).

446. Wolff Heintschel von Heinegg, *Territorial Sovereignty and Neutrality in Cyberspace*, 89 *INTERNATIONAL LAW STUDIES* 123, 151 (2013).



therefore be the only grounds where proper enforcement still depends upon the ability to capture the offending vessel. Historically, all captures required judgment in prize; however, it has already been shown that prize proceedings can be avoided by simple repatriation after capture. Even where capture is required for effective enforcement, this does nothing to increase the likelihood of the use of prize proceedings in future conflicts.

## PART SIX: MEANS OF ENFORCEMENT

Neutral merchant shipping is inviolable by belligerents except in six situations. These are when they are carrying contraband, engaging in a forbidden trade, breaching a blockade, intruding in a declared maritime zone, transgressing the vicinity of ongoing naval operations and giving unneutral service to the enemy. When any of the six circumstances pertain, three means of enforcement against neutral shipping are available to belligerents: visit and search, diversion and capture. Each will be examined in turn.

### *A. Visit and Search*

Some have questioned whether visit and search will remain an important mode of enforcement against neutral shipping in time of armed conflict.<sup>447</sup> It is nonetheless preserved by modern military manuals and was relied upon as a belligerent right by Egypt from 1948–79, India and Pakistan in 1965 and 1971, and Iran and Iraq from 1980–88. Coalition forces in the 1991 and 2003 Gulf Wars employed visit and search, as did NATO forces in operations in Libya in 2011. These conflicts and operations serve to demonstrate the persisting operational utility of visit and search, even if in some cases its legal basis was Security Council authorization rather than the law of armed conflict.

Belligerents may carry out visit and search operations on the high seas and in their own, and their enemy's, internal waters, territorial seas and exclusive economic zones. While nothing in UNCLOS forbids belligerents from conducting visit and search operations in neutral States' exclusive economic zones and above their continental shelves, they may not carry out such operations in neutral internal waters or territorial seas.<sup>448</sup> In certain sea areas, belligerents must have due regard to the rights of neutral States and others.<sup>449</sup> As Walker has noted:

Although coastal States have rights in the contiguous zone, exclusive economic zone . . . and the continental shelf, these zones' waters remain subject to high seas freedoms of navigation

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447. See, e.g., Heintschel von Heinegg, *Visit, Search, Diversion, and Capture: Part I*, *supra* note 20.

448. Hague XIII, *supra* note 7, art. 2.

449. Some rights under UNCLOS are enjoyed not solely by States, but by, *inter alia*, "ships and aircraft" (e.g., transit passage) and "mankind" (resource-related rights in the sea-bed and subsoil thereof beyond national jurisdiction). UNCLOS, *supra* note 32, art. 38, pmbl. para. 6.

and overflight as do waters above the [International Sea Bed Area, or “Area”], i.e., the deep seabed the LOS Convention reserves as humankind’s common heritage. Visit and search operations in these areas, and on [the] high seas . . . , are subject to a requirement that belligerents observe due regard for neutral States’ rights, whether that be high seas rights, neutrals’ rights in these zones, or humankind’s rights in the Area.<sup>450</sup>

He goes on to say that even in the belligerents’ territorial seas, neutral States enjoy the right of innocent passage, and that belligerents must pay due regard to that right, unless innocent passage has been lawfully suspended.<sup>451</sup> Walker’s position is undoubtedly correct.<sup>452</sup>

Under the law of armed conflict, the UK and San Remo manuals provide that a neutral vessel may be visited and searched where there are reasonable grounds to believe that the vessel is subject to capture.<sup>453</sup> This reasonable grounds threshold is not reflected in the same terms anywhere else. The Helsinki Principles provide for different thresholds depending on whether the object vessel is suspected of carrying contraband or breaching a blockade. In respect of the former, Principle 5.2.1 states “belligerent warships have a right to visit and search vis-à-vis neutral commercial ships in order to ascertain the character and destination of their cargo.”<sup>454</sup> On the other hand, Principle 5.2.10 provides, “Neutral vessels believed on reasonable and probable grounds to be breaching a blockade may be stopped and captured.”<sup>455</sup> The formulation of the Helsinki Principles reflects the plain fact that there is no need to visit and search a vessel to determine whether or not it is in breach of blockade—the belligerent is entitled to capture the vessel as soon as there is reasonable suspicion of breach. But reasonable suspicion is still required. No such threshold is used in the Principles in respect of the right of visit and search in the context of contraband. It can only be presumed that the difference is intentional, but regrettably there is no explanation to confirm this in the Principles’ commentary.

The Declaration of London, Havana Convention and the Harvard Draft Convention placed no threshold criterion on the belligerent right of visit and search.<sup>456</sup> In the

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450. WALKER, *supra* note 76, at 358.

451. *Id.* See also UNCLOS, *supra* note 32, art. 25(3).

452. See also Helsinki Principles, *supra* note 10, princ. 3.1-2, cmt. at 503–4.

453. SAN REMO MANUAL, *supra* note 26, r. 118; UK MANUAL, *supra* note 22, ¶ 13.91. In accordance with the general theme of the UK Manual, the right of visit and search is also subject to the caveat that “even when resort to force is justified, it should not exceed what is necessary and proportionate to the achievement of the goal for which force is used.” UK MANUAL, *supra* note 22, ¶ 13.3.

454. Helsinki Principles, *supra* note 10, princ. 5.2.1.

455. *Id.*, princ. 5.2.10.

456. Declaration of London, *supra* note 151, art. 63; Convention on Maritime Neutrality, *supra* note 116, art. 1; Harvard Draft Convention with Commentary, *supra* note 30, art. 49.

commentary to the Harvard Draft Convention, the drafters went as far as to say, “[Article 49] states an unquestioned rule of international law and is not deemed to require any explanatory discussion.”<sup>457</sup> The reasonable grounds formulation is not used in the German Commander’s Handbook, the Chinese Manual or NWP 1-14M.<sup>458</sup> Neither do these manuals suggest an alternative limiting threshold. The implication is that the right of visit and search may be exercised entirely at the belligerent State’s discretion. Nonetheless, scholars have suggested that reasonable suspicion has long been a de facto prerequisite for visit and search of a neutral vessel.<sup>459</sup> For instance, belligerents will always wish to make best use of their military resources, and it makes sense to focus visit and search operations where there is the greatest suspicion of unneutral behaviour.

Whether the law imposes a threshold requirement for visit and search is, therefore, uncertain. Practically, it probably does not matter. The doctrine of continuous voyage and the intention doctrine broaden the scope of vessels which might reasonably be suspected of unneutral conduct justifying capture. Continuous voyage renders it reasonable to suspect even vessels destined for neutral ports of contraband carriage. This author doubts that the intention doctrine is reflected in contemporary customary law but, if it is, it widens the scope of reasonable suspicion of breach of blockade to include vessels far from the blockaded coast.<sup>460</sup> The threshold of reasonable suspicion is so easily overcome in practice that it cannot amount to a substantial limitation on the exercise of visit and search. For this reason, Tucker described this debate as “bordering on sophistry.”<sup>461</sup>

Another issue, in the context of visit and search, is whether the law exempts neutral vessels under neutral convoy from belligerent visit and search. Historically, it did not. In *The Maria* (1799),<sup>462</sup> Sir William Scott punitively confiscated cargo and vessels when the neutral Swedish merchant vessels under the convoy of a Swedish warship forcibly resisted visit and search by a British warship. He recognized no exception from the regime of visit

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457. Harvard Draft Convention with Commentary, *supra* note 30, cmt. at 532.

458. GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 276; CHINESE MANUAL, *supra* note 25, at 266; NWP 1-14M, *supra* note 23, ¶ 7.6.1 (but does recommend that visit and search be undertaken with “all possible tact and discretion.”).

459. Heintschel von Heinegg, *Visit, Search, Diversion, and Capture: Part I*, *supra* note 20, at 297; Humphrey, *supra* note 252, at 39. In 1921, Oppenheim took the intermediary position that a vessel might be visited without suspicion, but searched if the visit generated “grave suspicion.” OPPENHEIM VOL. II, *supra* note 5, at 610.

460. *See supra* p. 61.

461. TUCKER, *supra* note 46, at 341.

462. *Supra* note 202.

and search for vessels under neutral convoy. He reasoned: “[T]he right of visiting and searching merchant-ships upon the high seas . . . is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. . . . [I]t cannot legally be maintained that [a neutral Sovereign] is authorized by law to obstruct the exercise of that right . . . .”<sup>463</sup>

On the other hand, the San Remo Manual states that a neutral merchant vessel under neutral convoy is exempt from the exercise of the belligerent’s right of visit and search if it satisfies the following criteria:

- a) it is bound for a neutral port;
- b) it is under convoy of an accompanying neutral warship of the same nationality or a neutral warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such convoy;
- c) the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and
- d) the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or military aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.<sup>464</sup>

The rule, in these terms, is also contained in military manuals.<sup>465</sup>

Recent State practice is broadly supportive. During the Iran-Iraq War in the 1980s, Iran had stopped, searched and, in some cases, attacked Kuwaiti tankers on the grounds that they were exporting oil from Iraq via Kuwaiti ports and helping to fund Iraq’s war effort. The legal basis for this activity is dubious. It has already been observed that a blockade is the only lawful grounds for interfering with enemy exports. Iran did not declare a formal blockade against Iraq and even if it had this would afford no justification for interfering with exports from neighbouring, neutral, Kuwait. Even if Kuwait was complicit in exporting Iraqi oil, this does not appear to constitute a breach of its broader neutral duties of impartiality or abstention.<sup>466</sup> In 1987, the U.S. responded to a request from the Kuwaiti government and re-flagged several Kuwaiti tankers to its own flag and placed them under the protection of its warships to safeguard them against Iranian interference. The U.S. declared that its ships would not be carrying oil from Iraq and that neither party would

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463. *Id.* at 359–61.

464. SAN REMO MANUAL, *supra* note 26, r. 120. The Helsinki Principles recognize the rule in broadly the same terms. Helsinki Principles, *supra* note 10, princ. 5.2.8, 6.1, cmt. at 514–15. *See also* Declaration of London, *supra* note 151, arts. 61–62.

465. UK MANUAL, *supra* note 22, ¶ 13.93; NWP 1-14M, *supra* note 23, ¶ 7.6; GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 271. The Chinese Manual does not address this issue.

466. *See* Introduction, *supra* pp. 6-11

have any basis for taking hostile actions against U.S. naval ships or the vessels they were protecting.<sup>467</sup> Iran did not attempt to board the re-flagged and convoyed vessels.<sup>468</sup> However, it might have been that Iran was motivated by a desire not to provoke the U.S. rather than any concern that it was legally bound to afford the re-flagged vessels any special protection.<sup>469</sup>

Reaction from other States similarly supports the view that vessels under neutral convoy were exempt from visit and search. At the time, the UK described its warships in the Persian Gulf as escorting rather than convoying its merchant vessels, perhaps reflecting a persisting view that a neutral convoy provided no protection from visit and search.<sup>470</sup> Since then, however, the UK has adopted the San Remo position in its 2004 manual.<sup>471</sup> France used a warship to protect a French-flagged merchant vessel (the *Ville d'Angers*) from being visited and searched by an Iranian warship, implying that France held the view that merchant vessels under the protection of a neutral warship were immune from visit and search.<sup>472</sup>

Some criticized the Kuwaiti re-flagging on the grounds that the re-flagged vessels did not enjoy a genuine link to the new flag State, although without doubting the broader principle that a neutral convoy provided protection from visit and search.<sup>473</sup> UNCLOS imposes substantial duties on flag States and requires a genuine link between vessel and State.<sup>474</sup> Third States (including the belligerents) would not be compelled to recognize the flag-shift if the link to the new flag State was not genuine.<sup>475</sup> The U.S., a non-party to UNCLOS, accepted at the time that the genuine link requirement was an obligation under

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467. The U.S. statement risked implicitly accepting that, without that guarantee, Iran might have been lawfully justified in interfering with the tankers. See Davidson, *supra* note 410, at 183.

468. Although as noted earlier, one, the *Bridgeton*, did strike a mine which the United States claimed was Iranian. Another, the *Sea Isle City*, was struck by a missile which the United States attributed to Iran. See *supra* pp. 87-88.

469. See WALKER, *supra* note 76, at 57. It has already been observed that both sides played scant regard to the law in other aspects of the Tanker War. See *supra* p. 81.

470. Humphrey, *supra* note 252, at 34.

471. UK MANUAL, *supra* note 22, ¶ 13.93.

472. Heintschel von Heinegg, *Visit, Search, Diversion, and Capture: Part II*, *supra* note 223, at 104; WALKER, *supra* note 76, at 63.

473. See Davidson, *supra* note 410, at 185-86.

474. UNCLOS, *supra* note 32, art. 94.

475. See *Barcelona Traction (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 70 (Feb. 5); Davidson, *supra* note 410, at 188.

customary law and believed that U.S. ownership, manning, safety and inspection requirements met the requirement.<sup>476</sup>

The San Remo Manual formulation of the rule avoids the genuine link issue because it does not require re-flagging for a merchant vessel of one neutral State to be convoyed by a warship of another neutral State.<sup>477</sup> An agreement between the neutral States to allow the convoy is sufficient. As long as that agreement is robust enough to allow the commander of an escorting warship to certify with certainty the character and cargo of the vessels protected, then the belligerent is obliged to rely upon the convoy commander's undertaking.<sup>478</sup> An agreement under the San Remo Manual rule would be sufficient to satisfy not just the law, but also the political message that the re-flagging was designed to convey to Iran: attack on or interference with the vessels would be construed as an attack on, or interference with the rights of, the U.S.<sup>479</sup> The broad acceptance of the San Remo Manual's position both in national manuals and State practice suggests the exemption from visit and search of vessels under neutral convoy reflects customary law.

## B. *Diversion*

A belligerent might wish to divert a neutral merchant vessel from its course for two purposes. First, diversion might be a sanction in itself to prevent the neutral vessel from committing some unneutral act, for example, breaching a blockade. This might be styled diversion *simpliciter*. Second, it might be ordered so that visit and search might be carried out in the safety of a belligerent's port.

As to diversion *simpliciter*, the San Remo Manual states, "As an alternative to visit and search, a neutral merchant vessel may, with its consent, be diverted from its declared destination."<sup>480</sup> The Manual's drafters considered this a novel rule and a new belligerent right. However, they believed that it was in the interests of neutrals and belligerents that the right be provided. The Manual's explanation observed: "There are situations in which it

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476. David L. Peace, *Major Maritime Events in the Persian Gulf 1984–1991: A Juridical Analysis*, 31 VIRGINIA JOURNAL OF INTERNATIONAL LAW 545, 554 (1991).

477. SAN REMO MANUAL, *supra* note 26, r. 120.

478. *Id.*, ¶ 120.4.

479. See U.S. Policy in the Persian Gulf, Hearing Before the S. Comm. on Foreign Relations, 100th Cong. 55 (1987) (statement of Michael H. Armacost, Under Secretary of State for Political Affairs), available at <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA496911>.

480. SAN REMO MANUAL, *supra* note 26, r. 119.

will suffice to keep merchant vessels out of certain areas instead of diverting them . . . for the purpose of visit and search.”<sup>481</sup> Such situations might include preventing a neutral merchant vessel from breaching a blockade, infringing a declared maritime zone or transgressing the immediate vicinity of naval operations. The rule eliminates the need for a time-consuming and potentially hazardous visit and search operation. The UK Manual also adopts this position.<sup>482</sup> Neither NWP 1-14M nor the Chinese Manual specifically refer to a right to divert neutral shipping as an alternative to visit and search. The German Commander’s Handbook authorizes the “giving of course instructions” to neutral merchant vessels where there is an “adequate probability of seizure,” but does not require the vessel’s consent.<sup>483</sup>

The San Remo and British view that diversion *simpliciter* can occur only with the consent of the neutral master is puzzling and, in the view of this author, wrong. The San Remo and UK manuals suggest that if the neutral master does not consent, then the intercepting warship may visit and search the vessel, divert it for visit and search, or let it proceed.<sup>484</sup> It seems odd that the sanction with lesser effect (diversion) requires consent, whereas the more onerous ones do not. Furthermore, one might question whether consent which is enforced by the threat of a more serious sanction is properly characterized as consent. Since the rule is a novel one, it is unlikely that any iterations of it yet reflect customary law. However, in terms of *lex ferenda*, the position of the German Commander’s Handbook is to be preferred.

Diversion to facilitate visit and search was heavily employed during the First and Second World Wars. Visit and search had become more difficult for a number of reasons: the increase in size of merchant vessels, neutral shippers’ ability to hide contraband items among other cargo and the risk of submarine attack borne by a stationary warship undertaking visit and search. The Allied Powers began to divert neutral merchant ships to safe sea areas or, better, a home port where visit and search might be carried out in greater detail and in greater safety. The British found this had other benefits. Neutral cargo brought into the domestic jurisdiction in this way found itself subject to British domestic licensing, customs and fiscal law. Even if cargo was not condemned as contraband, these

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481. *Id.*, ¶ 119.2.

482. UK MANUAL, *supra* note 22, ¶ 13.92.

483. GERMAN COMMANDER’S HANDBOOK, *supra* note 24, ¶ 281.

484. SAN REMO MANUAL, *supra* note 26, ¶ 119.2.



other domestic restrictions could also prove effective in limiting commerce with the enemy.<sup>485</sup> Widespread use of diversion, even if ostensibly only for the purpose of the safe conduct of visit and search, significantly reduced the number of cases resulting in capture and prize proceedings. It is another example of a development which contributes to the demise of the prize court.

The difficulties encountered in the world wars in conducting visit and search at sea still pertain. It is widely accepted among commentators that the right to divert a neutral merchant vessel in order to conduct visit and search persists.<sup>486</sup> The right is included in the San Remo Manual in circumstances when “visit and search at sea is impossible or unsafe.”<sup>487</sup> The Manual’s explanation is clear that this sort of diversion is a compulsory order which a neutral merchant vessel is compelled to obey, a point which only serves to underline the incongruity of the Manual’s insistence that diversion for its own sake may be done only with the neutral vessel’s consent.<sup>488</sup>

Tucker was persuaded that the practice of diversion for visit and search purposes had survived into post-Second World War law, but wondered whether, as a matter of *lex ferenda*, it ought to have.<sup>489</sup> His concern was that diversion could be ordered as soon as there was justification for visit and search; since there was a very low threshold, if any, for visit and search, it gave belligerents authority to divert virtually any neutral merchant ship to one of its ports. Previously, belligerent warships’ boarding parties would have to show sufficient evidence to justify seizure, and then formally take the vessel as prize before sending it off to a home port for prize proceedings—a significantly higher evidentiary threshold. Diversion could be particularly pernicious to neutral traders, especially as it renders their cargo subject to the domestic jurisdiction of the diverting State. The English Prize Court has ruled, consistent with the UK Manual’s position on visit and search, that a reasonable suspicion of some unneutral behaviour is required before diversion.<sup>490</sup> Given the low threshold for legitimate visit and search, this affords scant comfort to neutral traders.

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485. *The Falk* [1921] 1 AC 787, 796-8, *per* Lord Sumner. *See also* Fitzmaurice, *supra* note 145, at 74–78.

486. WALKER, *supra* note 76, at 133 (who cites the San Remo Manual to say that “the diversion option” is now recognized practice). *See also* Heintschel von Heinegg, *Visit Search Diversion and Capture Part II*, *supra* note 223, at 133.

487. SAN REMO MANUAL, *supra* note 26, r. 121.

488. *Id.*, ¶ 121.1.

489. Tucker, *supra* note 46, at 338–44.

490. *The Mim* [1947] P. 115, 121 *per* Hodson J.

The broad acceptance of diversion for visit and search has the potential for significant detriment to neutrals. One way in which the rule's potential for harm might be reduced would be to recognize a higher threshold for visit and search in the first place—a restrictive interpretation of the reasonable suspicion threshold, for example. This seems an unlikely development.

### C. Capture

Neutral merchant vessels are subject to capture if they carry contraband, refuse or actively resist visit and search, perform unneutral service or breach a blockade.<sup>491</sup> It is not clear whether the law allows for the capture of neutral vessels which infringe a declared maritime zone. It was concluded above that a maritime zone was a lawful basis for belligerent interference in neutral freedom of navigation, but that the law was not settled as to the appropriate enforcement measure.<sup>492</sup> In many cases, an order to change course or leave the restricted area will satisfy the belligerent's need. Logically, though, capture should be an available penalty where simple diversion is not sufficient or not obeyed.

After capture, *toute prise doit être jugée*: all captures must be adjudicated upon by a prize court. The capturing commander must therefore be able to show that there is sufficient evidence to found a case. Fitzmaurice put it this way, “simple seizure in Prize is justified if there appears to be an adequate *prima facie* case.”<sup>493</sup> The “adequate *prima facie* case” test is not prescribed in any of the national manuals surveyed, although it does reflect earlier practice in the English and Russian prize courts.<sup>494</sup> While without doubt this reflects the law, this dissertation has highlighted a number of factors to show that belligerents will not need to rely on capture in the future, or will be reluctant to do so. These include the use of navicerts and diversion, and the growth in international arms control, as well as the logistical difficulties of storing captured vessels and cargos and accommodating captured

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491. UK MANUAL, *supra* note 22, ¶ 13.106; NWP 1-14M, *supra* note 23, ¶ 7.10; GERMAN COMMANDER'S HANDBOOK, *supra* note 24, ¶ 285; CHINESE MANUAL, *supra* note 25, at 266; Heintschel von Heinegg, *Visit, Search, Diversion, and Capture: Part I*, *supra* note 20, at 316; SAN REMO MANUAL, *supra* note 26, r. 146.

492. See *supra* p. 81.

493. Fitzmaurice, *supra* note 145, at 74 n.1. The SAN REMO MANUAL, *supra* note 26, ¶ 146.2, expresses this evidentiary threshold justifying seizure in broadly the same terms.

494. The *Baron Stjernblad*, *supra* note 193, at 175, *per* Lord Parker of Waddington. The Russian Supreme Prize Court adopted a similar approach in *The Allanton* (1904), reported in HURST & BRAY VOL. I, *supra* note 194, at 1.

crews. Capture is onerous and difficult and it seems likely that belligerent States will avoid it where possible.

D. Jus ad Bellum Constraints on Enforcing Maritime Neutrality Law

The UK Manual, in the Introduction to the Maritime Warfare chapter, makes the following assertion:

[T]he conduct of armed conflict . . . is subject to the limitations imposed by the UN Charter on all use of force. . . . [E]ven when resort to force is justified, it should not exceed what is necessary and proportionate to the achievement of the goal for which force may be used. In a conflict of limited scope, this may mean that a belligerent state is constrained, to a greater extent than the rules set out in this chapter might suggest, in the action that it may lawfully take . . . .<sup>495</sup>

The UK has held this position since at least 1982, when it relied upon the *jus ad bellum* to justify specific military actions in the Falklands War rather than purely the *jus in bello*.<sup>496</sup> The ICJ, in dicta, supports this position in the *Oil Platforms* decision.<sup>497</sup>

The British government's position has been criticized by some scholars. Heintschel von Heinegg considers that:

[E]fforts to limit the *in bello* legality in the light of the *jus ad bellum* have been futile and cannot be considered as reflecting the general consensus of states. Hence, if, during an international armed conflict, a blockade is in compliance with the rules and principles of the law of air or naval warfare, its legality may not be doubted.<sup>498</sup>

It is certainly true that the UK view is unique among the national manuals surveyed. On one view, the UK position is sensible as a matter of *lex ferenda*. It should ensure that all military operations within an armed conflict are properly addressed to the specific aims and objectives of the conflict. On the other, it might be dangerous in that it might place unnecessary constraints (dressed as legal constraints) upon commanders in their planning

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495. UK MANUAL, *supra* note 22, ¶ 13.3.

496. See the British government's statements on the sinking of the *General Belgrano* as discussed in POLITAKIS, *supra* note 233, at 86–89.

497. *Oil Platforms*, *supra* note 91, at 186–87.

498. Wolff Heintschel von Heinegg, *Blockades and Interdictions*, in THE OXFORD HANDBOOK ON THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller ed., forthcoming 2014). See also Laurie R. Blank, *Ukraine: How Jus ad Bellum and Jus In Bello Operate in the Same Space*, LAW TODAY (31 Mar. 2014), <http://today.law.utah.edu/projects/ukraine-how-jus-ad-bellum-and-jus-in-bello-operate-in-the-same-space/>.

and conduct of operations. This debate is pertinent insofar as it relates to the conduct of operations against the enemy without impact on neutral States. However, if a belligerent takes military action which involves the vessels or territory of neutral States, it is far harder to argue that the belligerent's U.N. Charter obligations to the neutral State are not in play.

Two examples illustrate the point. The first is of a neutral-flagged vessel which makes itself a legitimate military objective by some form of unneutral service to the enemy, thus rendering itself a lawful target for attack under the *jus in bello*. Whether a belligerent attack in such instances amounts to a use of force contrary to Article 2(4), requiring separate justification under Article 51, was discussed above.<sup>499</sup> Whether it did or did not depended on the context; what was not in doubt, however, was that Charter norms applied. Just because an armed conflict exists between States A and B does not *ipso facto* justify State A or B in using force against neutral State C unless there is a basis in the *jus ad bellum*.

The second example is where a belligerent sinks an enemy warship which is using neutral territorial sea as a sanctuary because the neutral State in question is unwilling or unable to evict the guilty warship. It cannot be doubted that the warship is a lawful target under the *jus in bello*. But the attack probably also amounts to a use of force against the territorial integrity of the hapless or unwilling neutral State, contrary to Article 2(4).<sup>500</sup> Once again, it cannot be doubted that Charter norms apply; what is in question is the scope of Article 2(4) in each case. Accordingly, before taking military action against a neutral vessel or a belligerent vessel unlawfully present in neutral territorial sea, a belligerent State will need to ensure that its action complies with the *jus ad bellum*, as well as the specific rules of maritime neutrality.

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499. See *supra* pp. 87-88.

500. UNCLOS, *supra* note 32, art 2.

## CONCLUSION

This dissertation has considered all aspects of maritime neutrality law, ranging from passage rights in territorial seas to the circumstances in which belligerents can attack neutral merchant vessels. This Conclusion will draw together the specific conclusions from each Part, before making some more general observations.

Belligerent warships and auxiliaries do not enjoy the right of innocent passage in neutral territorial waters. They may, however, avail themselves of the right of mere passage when not prohibited or restricted by the coastal State. Mere and innocent passage appear very similar, but the key difference between the two is the greater discretion afforded to coastal States in respect of mere passage, both in permitting it in the first place and regulating it if they choose to permit it.

Belligerents continue to enjoy the non-suspendable passage rights provided for in customary international law and/or UNCLOS. Transit passage, a creature of UNCLOS, is strictly applicable only where the belligerent and the neutral coastal State are parties to UNCLOS. The enjoyment of any passage right by a belligerent in neutral territorial sea is subject to the twenty-four hour rule and the prohibitions on seeking sanctuary or basing operations in neutral waters.

Belligerents may, subject to the neutral State's consent, use neutral ports for refuelling, revictualing and repair. Neutral States must make their port facilities available to each belligerent on an impartial basis. While the state of the law on how much fuel or victuals belligerents may take on board is uncertain, this dissertation recommends that belligerents should be able to top up both, but subject to a prohibition on resupply from ports of the same neutral State within three months. As to repairs, this dissertation favours the view that battle damage repairs in neutral ports ought to be forbidden by the law.

In the area of belligerent control of trade, States, in their manuals, have preserved for themselves the traditional law rules on contraband. Much of the law and State practice in this area predates the Second World War; indeed, much of it is drawn from European practice during the Napoleonic Wars. Predicting how contraband measures might be enforced in future conflicts is, therefore, difficult. This dissertation concludes that belligerent States which wish to rely on contraband controls must still publish affirmative contraband lists. Other than the stipulated free goods, which are widely accepted, it is

conceded that States' lists may be long and wide-ranging. However, the requirement to publish them at least provides neutral States with the opportunity to protest. The distinction between absolute and conditional contraband has almost certainly fallen into desuetude. It has been replaced by an evidentiary question—is there sufficient evidence, on the balance of probabilities, that the goods in question will be used to sustain the enemy's war effort? The enemy destination requirement for contraband is similarly a question of fact determined upon available evidence and any evidentiary presumptions provided for by the domestic prize law of the belligerent State. Practice in previous conflicts, although hardly recent, suggests that prize courts often find and use any evidence at all in favour of the belligerent captors. Second World War developments indicate that, in the future, these evidentiary questions (use and destination) will be in the hands not of prize courts, but executive officials administering a navicert regime. The advent of navicerts, coupled with the development of the belligerent ability to divert rather than capture shipping suspected of carrying contraband, is likely to spell the end of prize proceedings dealing with contraband carriage.

Unlike contraband, blockade has been recently practised. Its employment by Israel in Lebanon and Gaza, the response of States to its use and the findings of the Turkish, Turkel and Palmer reports reinforced much of the traditional law of blockade. This dissertation has suggested that blockades should no longer be required to be enforced impartially. Focused, discretionary enforcement of a blockade would allow blockades to be effectively maintained, but with probably lesser impact on neutral traders and the population of the blockaded territory. Like contraband, the belligerent's capacity to divert shipping which would otherwise be in breach of the blockade reduces the necessity for capture. Fewer captures mean fewer prize proceedings. Indeed, even where captures are effected, the Israeli action against the Gaza flotilla shows that prize proceedings need not necessarily follow—vessels, cargos and crews may simply be repatriated rather than confiscated or detained. Prize proceedings in the context of blockade are as unlikely these days as they are in respect of contraband.

Maritime zones are a relatively new yet, in the view of this author, well-established belligerent right. The requirement that they take account of neutral interests, coupled with the absence of a rule that they be enforced impartially, mitigates to some degree their potential for harm to neutral freedom of trade and navigation. While this dissertation

postulates that capture ought to be an available mode of enforcement of maritime zones as much as in any other area of maritime neutrality, belligerent reluctance to effect captures for breach or suspected breach of other rules means capture remains an unlikely mode of enforcement in practice. Zones are more likely to be enforced by diversions.

Unneutral service, the means by which neutral vessels might act partially to one belligerent over another, should be considered to be divided into two categories. In the first, unneutral service which results in liability to attack, are offending neutral vessels that become legitimate military targets and may be dealt with under the law of naval warfare. Whether an attack by a belligerent on a neutral merchant vessel amounts to a use of force against the neutral flag State is a complex question which will ultimately be determined by the facts of each case. Where it does, the belligerent State must comply not only with the law of naval warfare, but also with the *jus ad bellum*. The second category, unneutral service which results in liability to capture, is unashamedly a catch-all category of means by which neutral vessels might support one belligerent's cause over the other's, yet is conduct falling short of the high threshold for rendering themselves a lawful target for attack. Examples might be Internet hacking activity or complicity in some form of cyber operation. Once again, just because this sort of activity renders a vessel *liable* for capture, does not oblige the wronged belligerent to enforce its rights by capture—a diversion or an order to desist might be sufficient.

More generally, this dissertation shows that many of the substantive rules of maritime neutrality have remained fundamentally unaltered since the 1909 Declaration of London. Of course, there have been some changes. The advent of the doctrine of maritime zones is the most significant. But States continue to preserve the traditional law of contraband in their manuals, and blockade has recently been employed in its classic terms. The concept of unneutral service remains recognized.

On the other hand, the means of enforcing rules of maritime neutrality by belligerents is likely to be significantly different in the future. Visit and search has remained a stubbornly effective method of warfare, despite predictions to the contrary. Navicerts would reduce the need for visit and search in contraband enforcement, although they would still require residual visit and search enforcement. Subject to the development of cyber means of enforcement, maritime zones, blockades and unneutral service all rely to some extent on visit and search to be effective. While visit and search is likely to be

employed for some time to come, capture of suspect vessels has been shown to be all but moribund. Capturing vessels found in breach of rules is difficult, onerous and resource intensive. While Israel did capture the *Mavi Marmara* and the other vessels of the Gaza flotilla, the Gaza blockade was most often enforced by warnings and diversions.

The existence of diversion *simpliciter* as a lawful mode of enforcement greatly reduces the need for captures. This dissertation does not subscribe to the view that such diversions may only be with the consent of the neutral master, especially as diversion for the purpose of visit and search is widely regarded as a lawful, non-consensual penalty. Indeed, the latter mode of enforcement ought to be of graver concern to neutral traders. Diversion for visit and search may be ordered whenever there is grounds for visit and search and to conduct it at sea would be impossible or unsafe—a determination in the hands of the belligerent. The belligerent State therefore enjoys a broad discretion to divert neutral shipping to a port within its domestic jurisdiction, subjecting them to its domestic laws. The only solution to this conundrum is to impose a higher threshold for visit and search operations, which is an unlikely development.

The last observation to make is that the growth of the view that the *jus ad bellum* continues to govern belligerent activity during an armed conflict, both between the belligerents and their interaction with neutral States, suggests the type of conflict in which interference with neutral shipping might legitimately be conducted is more tightly constrained than ever before. The UK's limited war in the Falklands in 1982 demonstrated no necessity to interdict Argentinian trade. The UK view at the time was that all belligerent activity against Argentina fell to be judged under Article 51 of the Charter, as well as the rules of naval warfare. Belligerent activity, lawful under the law of naval warfare or the traditional law of neutrality, would be rendered unlawful under Article 51 of the Charter if it was not necessary or proportionate to the limited aim of the conflict. If this view took hold more broadly, then enforcement of maritime neutrality rules will be a feature only of the most serious of conflicts.



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